

LAW IN THE MAKING .

# LAW IN THE MAKING

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## PREFACE

UNDER the title of 'The Sources of Law', the substance of the following pages formed the Tagore Lectures for 1926 in the University of Calcutta. Since the word 'sources' has become chiefly identified with literary or documentary *fontes*—which are not primarily the subject here discussed—it was thought that the original title might be misleading, and the present title was therefore adopted.

My chief debt, and one which I cannot adequately acknowledge, is owed to the guidance and generous help of the late Sir Paul Vinogradoff. I should have liked to dedicate the volume to his memory, but am deterred by the unworthiness of the tribute. Dr. F. de Zulueta, Regius Professor of Civil Law, Dr. W. S. Holdsworth, Vinerian Professor of English Law, Sir John Miles, Fellow of Merton College, and Mr. D. L. Keir, Fellow of University College, have greatly assisted me with many valuable suggestions and have saved me from not a few pitfalls. If I have fallen into any which have escaped their kindly vigilance, the responsibility is not theirs.

Every writer on legal topics suffers under the disability that while his book is in the press changes may take place in the law, or new illustrations may become available, which cannot be embodied in the text without great inconvenience. I have been obliged to exclude a good deal of such new material, and must content myself with directing

the reader's attention to the observations of the Court of Appeal, in *The Mostyn*, (1927) P. 25, or *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, which is discussed at pp. 282f.; to Mr. D. T. Oliver's essay on 'Roman Law in Modern Cases in English Courts' in *Cambridge Legal Essays*, with reference to the topic discussed at pp. 153f.; and to Mr. H. E. Salt's essay on 'The Local Ambit of a Custom' in the same volume, with reference to topics discussed in Appendix B. I regret that Prof. J. A. Fairlie's *Administrative Procedure in connection with Statutory Rules and Orders in Great Britain* came to my notice too late to give me the valuable help of which I should have been glad to make use in the last chapter. I must add, *à propos* of the same chapter, that a new complexion is put upon some aspects of the questions there discussed by the publication of the Report of the Crown Proceedings Committee (H.M.S.O., Cmd. 2842, 1927); but at the time of writing it is not known whether the Bill drafted by that Committee will become law.

The material of some portions of the book has been used, though for the most part in different form, in articles which have appeared in *The Law Quarterly Review*, *The Juridical Review*, and *The Columbia Law Review*. I am indebted to the Editors of those learned journals for permission to reproduce this material.

C. K. A.

OXFORD,

8th July, 1927.

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*Errata*

P. 186, l. 8 from bottom. *After Noy delete point.*

P. 277, l. 10. *For Workmen's Compensation Act, 1908,  
read Workmen's Compensation Act, 1906.*

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## LIST OF ABBREVIATIONS

<i>Arch. fur civ. Pr</i>	<i>Archiv fur civilistische Praxis</i>
<i>DPR.</i>	<i>Deutsches Privatrecht</i>
<i>E.H.R.</i>	<i>English Historical Review</i>
<i>H.L.R.</i>	<i>Harvard Law Review</i>
<i>Halsbury, L. of E.</i>	<i>Halsbury's Laws of England</i>
<i>Holdsworth, H E.L</i>	<i>W S Holdsworth, History of English Law (2nd edn.)</i>
<i>J.S.C L.</i>	<i>Journal of the Society of Comparative Legislation</i>
<i>L.Q.R.</i>	<i>Law Quarterly Review</i>
<i>Pand</i>	<i>Pandekten</i>
<i>P. &amp; M.</i>	<i>Pollock &amp; Maitland, History of English Law</i>
<i>S S*</i>	<i>Selden Society</i>
<i>S.R. &amp; O.</i>	<i>Statutory Rules and Orders</i>
<i>Statt. R.</i>	<i>Statutes of the Realm</i>
<i>Vin. Abr.</i>	<i>Viner's Abridgement</i>
<i>Z.S.S.</i>	<i>Zeitschrift der Savigny Stiftung</i>

\* When Selden Society publications are referred to with the prefix 'vol.', this indicates the number of the volume in the whole series ; when in brackets without the prefix 'vol.', the reference is to the number in the special Year Books series.

## INTRODUCTION

### THE SOVEREIGN AS THE SOURCE OF LAW

IN these pages we shall be concerned with the sources of law, but not those sources which are commonly called 'literary'. The 'documentation' of law is a study for the legal historian. By sources we mean the chief materials and processes in society which have gone to make up, and which still make up, the general body of law, and especially of English law.

In the accepted terminology of current jurisprudence, these are called the 'material sources' of law. A distinction is drawn between them and the 'formal source' of law. 'The formal source of the whole body of the civil law', we read in a well-known text-book of jurisprudence,<sup>1</sup> 'is one and the same, namely, the will and power of the State as manifested in courts of justice.' This proposition introduces an unnecessary confusion into the conception of legal sources. It is difficult, indeed, to attach any clear meaning to the term 'formal source'. A thing is either a source, an origin, a spring giving rise to a stream, or it is not. It is one thing to say that 'the will and power of the State' must always, in the present development of society, direct and control the stream within a certain channel, or even add to its volume; it is another thing to say that this controlling power is a source in itself, different from and apparently more powerful than all other sources. When it is stated, in the same treatise, that 'customary law . . . has its material source in the usages of those who are subject to it; but it has its formal source in the will of the State, no less than statutory law itself', the word 'source' seems to have lost all consistent meaning. The source of statutory

The meaning of 'sources' of law.

'Material' and 'formal' sources.

<sup>1</sup> Salmond, *Jurisprudence* (7th edition), 164.

law is clear and unmistakable—it is a, specially constituted legislative organ; the source of customary law is something admittedly different, and all that seems to be meant by 'formal source' is that at a certain stage of legal development, the specially constituted 'will of the State', if called upon to do so, lends express recognition to what has already approved itself in practice. No doubt this is a 'formal' sanction—it supplies a new and definite form—but it is in no true sense a source.

Two  
views  
of the  
genesis  
of law.

This popular distinction is, in fact, an attempted compromise between two irreconcilable conceptions of the growth of law: and it is still necessary for every student of jurisprudence to define his attitude towards these two conflicting views. In the one, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality. In the one case, law is artificial: the picture is that of an omnipotent authority standing high above society, and issuing *downwards* its behests. In the other case, law is spontaneous, growing *upwards*, independently of any dominant will. The second view does not exclude the notion of sanction or enforcement by a supreme established authority. This, in most societies, becomes necessary at some stage in the ordinary course of social growth. But authority so set up and obeyed by agreement is not the sole and indispensable source of all law. It is itself a creation of law. In the other view, it is and must be the creator of law. It enforces law, so to say, because it has the right to do what it likes with its own. According to this doctrine, the existence of a dominating sovereign will is an absolute prerequisite to ~~all~~ law. There may be social observances existing before it or without it, but they are *not law* in any proper significance of that term. Before any rules deserving the name of law can be said to exist, there must be a sovereign from which they can derive authority.

In Austin, this position is consistently maintained. He attempts no compromise of so-called 'formal' and 'material' sources. There may be 'immediate and mediate', 'direct and indirect or oblique' sources, but again and again he insists that the full dignity of the term 'source' can be properly applied only to the sovereign. Legislation, then, is the most appropriate, as being the most direct, expression of the sovereign's will. But nobody ever supposed that law consisted solely of legislation. The most extreme Austinian dogma could not abolish the immemorial distinction between *ius* and *lex*. Common Law, custom, precedent, equity, were, to say the least, distinguishable and operative elements in English law in Austin's day as much as in our own. Austin classifies them as 'subordinate sources' of law, and the explanation which he gives of that term really amounts to denying that they are sources at all.

The Austinian sovereign—sole source of law.

'In one of its senses, the source of a law is its direct or immediate author. For either directly or remotely, the sovereign, or supreme legislator, is the author of all law; and all laws are derived from the same source; but immediately and directly laws have different authors. As proceeding from *immediate* authors of different characters or descriptions, laws are talked of (in the language of metaphor) as if they arose and flowed from different fountains or sources: in other words, the *immediate* author of a given rule (whether that author be the sovereign or any individual or body legislating in subordination to the sovereign) is styled the fountain, or the source, from which the rule in question springs and streams. But this talk is rather fanciful than just; for, applying the metaphor with the consistency which even poetry requires, rules established immediately by the supreme legislature are the only rules springing from a *fons* or *source*. Individuals or bodies legislating in subordination to the sovereign are more properly *reservoirs* fed from the source of all law, the supreme legislature, and again emitting the borrowed waters which they receive from that Fountain of Law.'

<sup>1</sup> *Jurisprudence*, Lect. XXVIII. It is curious that Austin, consciously or unconsciously, exactly reverses a metaphor used by Black-



The  
analytical  
stand-  
point.

This view may gain some plausibility when it is urged that Austin's task was solely to analyse the existing elements of a modern legal system. The severely 'analytical' jurist, while admitting that various historical elements have gone to make up the material of law, may claim that he deliberately excludes those elements from consideration, being concerned only to dissect the legal arrangement as he finds it; and he finds it, in the modern world, invariably subordinated to the control of a sovereign power. But this is to beg the whole question. The distinct materials found to exist in the law cannot be understood independently of their historical evolution. Their origin—whatever their present scope and effect—is essentially a matter of social history; and to predicate that this origin is and must be a single sovereign, of modern type, is to stultify the whole inquiry. This weakness is very noticeable throughout Austin's treatment of the sources of law. He could not be content with pure analysis, but, in spite of himself, felt the necessity of supporting his main thesis by historical illustrations. Unfortunately, his examples, drawn almost entirely from Roman Law, are startling in their inaccuracy, and nowhere more than here does he show himself the victim of fixed ideas. Observe, for example, the domination of the preconceived English Parliamentary sovereign in the following remarkable statement:

'If our House of Lords and House of Commons sometimes sat and voted in one assembly, and sometimes separately as at present, they would afford an exact parallel to the manner in which the sovereign was divided in the Roman Republic. Acts passed by the two bodies assembled in one House would correspond to *leges curiatae* and *centuriatae*; acts originating in the

stone: 'Justice is not derived from the King, as from his free gift; but he is the steward of the public, to dispense it to whom it is *due*. He is not the spring, but the reservoir; from whence right and equity are conducted by a thousand channels, to every individual': 1 *Comm.* 266.

one House and adopted by the other would be *plebiscita* or *senatusconsulta*?

Though we cannot expect Austin to anticipate nineteenth-century research into Roman legislative organs, it is difficult to understand how, even in his own day, he arrived at this extraordinary analogy. Or again, take this account of the praetorian law:

‘It was not made in the way of decisions in particular cases, but consisted of general laws, made and promulged in the way of direct legislation; by virtue of a power assumed at first by the Praetors, with the acquiescence of the supreme legislature, and subsequently confirmed to them by its express recognition and authority.’

The ‘express recognition and authority’ was presumably Hadrian’s codification of the *ius honorarium*; but this was essentially declaratory of a body of law which had grown to maturity, and to say that until the reign of Hadrian the praetorian law was applied ‘with the acquiescence of the supreme legislative authority’ is mere invention. No such thing ever happened in fact. What Austin really means, consistently with his doctrine of ‘imposed’ law, is that ‘acquiescence’ *ought* to have happened in fact. As it did not, the whole remarkable structure of Roman equitable law becomes, in Austin’s eyes, to that extent discredited. It is ‘merely an incondite mass of occasional and insulated rules, that had grown, by a slow and nearly insensible aggregation, through a long succession of ages’. This ‘incondite mass’ became the *viva vox iuris civilis*. This bastard offspring of ‘subordinate’ legislation radically affected, and in some capital respects wholly changed, every important department of Roman Law. To regard it as anything but a source of law in itself is to distort known facts.

The conception of subordinate sources of law existing, as it were, on sufferance, is a corollary to the doctrine of unlimited sovereignty, ‘as great as possibly

Modern criticisms of it.

men can be imagined to make it', which Austin adopted enthusiastically from Hobbes; sovereignty, in the celebrated phrase of the French constitution of 1791, 'indivisible, inalienable, and imprescriptible'. We need not recapitulate familiar criticisms of the main Austinian, or more properly Hobbian, position. Whatever room may still be left for controversy, it may be said without temerity that at least two qualifications of Leviathan sovereignty are now generally conceded: and to concede them is to deny the doctrine two of its most vital postulates. (1) Whatever be the sanctioning power which secures the observance and enforcement of law—and some sanction of this kind is admittedly indispensable—there is no historical justification for the view that this power must always and necessarily be a *determinate* 'human superior'. It is impossible in every form of society governed by law to disengage and personify the sovereign with the artificial precision which Hobbes and Austin assume. (2) The sovereign power, whatever its nature, is not to be conceived merely as a means of saving society from itself. To Hobbes (again followed specifically by Austin) the alternatives are unmistakable. 'And though of so unlimited a power men may fancy many evil consequences, yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are much worse.' Modern studies of the natural history of law have entirely discredited this supposed state of natural social warfare. The group-instinct, out of which society has grown, is based on co-operation, not on strife, and no human group could ever have survived without combining to resist or adapt adverse conditions of physical environment. Indeed, the principle need not be confined to human societies; it is not the habit of any group of creatures to exist only for internecine strife. Hobbes's famous *homo homini lupus* was an inapt metaphor, for the wolf is not the natural enemy of the wolf, and the pack is based on

combination, not on warfare. This admitted, the determinate sovereign's title to authority is gravely challenged. A group existing by combination and unity of aim is bound to provide itself with rules; it is not, in mere desperation, compelled to surrender its will to a supreme lawgiver in order to save itself from disruption. Law, in short, begins to grow as soon as society begins to grow; it is not invented and imposed *ab extra* at any specific stage of development.

But again it may be urged that these criticisms, even if conceded, have a purely academic or antiquarian interest. Whatever may have been the history of primitive societies, the law of the modern civilized world is, as a fact, invariably enforced by some kind of ultimate sanction; is it not, then, substantially true to say, with Austin, that this sanctioning power is the source of the authority of law? The argument has undoubtedly carried weight with many practical minds. The attraction of the Austinian theory of law has lain in its simplicity and consistency. In social no less than in spiritual life, doubts and difficulties give rise to a natural desire for infallible Authority; and since law is inevitably bound up with the crucial problem of justice, such doubts and difficulties will certainly never be absent from it. The comfort of certainty lies in a sovereign which is a definite, constant, and tangible centre of gravity for the operation of law. Without it, we are told, nothing remains but unreal speculation. One of the most remarkable features of the political philosophy of Hobbes, and of the jurisprudence of Austin, is that despite the unsparing attacks to which they have been continuously subjected, their vitality is still far from exhausted. For a systematic exposition of the methods of jurisprudence, we still have to turn to Austin. Nobody has replaced him. And yet the student may well wonder why he reads Austin only in order to controvert him. Austinian jurisprudence, however, despite its admitted deficiencies and the

Influence  
of  
Austinian  
juris-  
prudence.

further disadvantage of an unattractive manner of presentation, remains indubitably influential, and may still be described as the characteristic jurisprudence of England.

Its acknowledged weaknesses. But Consistency and Authority may be bought too dear. Apart from its historical, or rather non-historical, aspect, the analytical doctrine has not proved itself to be the only practical and consistent scheme of modern law. For many years, to take only one example, it has become increasingly evident that Austin's indivisible sovereignty is quite inappropriate to modern federal States; and it is even more difficult of application to some kinds of States which seem to be emerging from the social conditions of *post-bellum* Europe. In no country but England would the Austinian dogma be regarded to-day as anything but an anachronism; and even in England, where, as we have said, Austin has not been definitely replaced and his doctrines are still perpetuated, there has been for many years a growing realization that a new conception of law is made necessary by changed conditions. It is true that Austin's critics are by no means agreed among themselves, and it is largely owing to their disagreements that the unitary sovereign still sits, though insecurely, upon his throne. It is not our task here to attempt to reconcile the critics, or to enter upon any general examination of the theory of sovereignty. But it is relevant to our purpose to glance rapidly at the principal movements in the theory of jurisprudence which have brought us to the now prevailing point of view—a point of view which must radically affect our method of approaching the study of the sources of law.

The  
Byzantine  
tradition.

Maine's well-known criticisms have probably been the most influential among English lawyers in calling in question the theory of a *determinate* sovereign as the postulate of all efficient social organization. His conclusions were based upon well-attested features of Eastern societies; and we may regard it as the

converse of his thesis that Hobbes and Austin, far from establishing a permanent and universal type of society, represent no more than a single phase in the development of Western society. That phase is governed by a conception of sovereignty which, if it is not solely derived from, is powerfully influenced by the Roman, or more strictly the Byzantine, theory of monarchy. If Caesar and Tacitus are to be believed, an absolutist principate was not native to the Germanic peoples; but the pomp of Byzantine imperialism was enthusiastically adopted, and even exaggerated, by the barbarians who conquered Rome, and who were faced with the problem of ruling, over an enormous area, provincials accustomed to absolutist forms of government. Some writers, like Allen in his description of *The Royal Prerogative in England*, have exaggerated the direct adoption of Roman institutions; but the influence, direct and indirect, was certainly widespread and sustained, and was destined to permeate European institutions for many centuries. It need hardly be observed that it was not the only doctrine of government which philosophy had offered the world. It would have caused surprise, and no little pain, to Plato or Aristotle. But its influence has been continuous and is not yet exhausted. With Dante, Byzantine sovereignty becomes not only an epic but a gospel. It is Justinian himself who appears in glory to Dante and Beatrice, sings the splendour of the Roman Empire, and admonishes those who would seek to distract its unified pre-eminence. In the *De Monarchia*, it is the special mission of Rome to govern the world in one divinely ordained hegemony. As there must be one God of the universe, one Christ of the Church, one head of the family, so there must be one sovereign ruler, and one only, of every human society. More—there must be one leader of the whole world; and for that high function the Roman people is destined not only by the will of God, manifested in many ways, but by the

human right of conquest. When all allowance has been made for the nationalistic bias of poetic fervour, Dante's exaltation of the unitary sovereign was no mere figment. In its spiritual or ecclesiastical manifestation, it still holds sway; in its temporal aspect, it embodied what was to be, for Europe, a long contest between absolutism and individual liberty. Three hundred years later it finds an apostle less imaginative but even more persuasive, in Bodin. The exercise of power—the basis of this conception of sovereignty—is the centre of Hobbes's political doctrine, which had so great an influence both in England and abroad. And there was no lack of practical demonstration of personified power. In the German States of the seventeenth century, some three hundred imperators held sway. Small wonder that jurists like Pufendorf, Thomasius, and Christian Wolff were deeply concerned with the theory of political power, of which they often had intimate and sharp personal experience. It is a comparatively short time since France emerged from more than a thousand years of monarchy, not inaccurately epitomized in Louis XIV's famous aphorism.

The feudal and the monarchical principles in England. But the Middle Ages also gave birth to the principle of feudalism, founded upon the notion of contract, not of command. The coexistence of these two fundamentally different theories of government leads to a curious dualism, nowhere better illustrated than in the development of monarchical doctrine in England. The Anglo-Saxon kings were no imperators, and their Norman and Angevin successors were essentially feudal overlords. In Bracton's day, as has been observed by Pollock and Maitland, 'the theory that in every State there must be some man or definite body of men, some sovereign without duties and without rights, would have been rejected'. Bracton is in two minds between the Romanistic and the feudal conception. He reproduces familiar Roman generalities about the sovereign's

dignity and pre-eminence ; but, faithful to the Common Law and feudal principles in which he is steeped, he makes cautious reservations as to the limits of royal power. Thus in procedure by assize, he leaves the subject remediless against his sovereign, with no hope of redress save in 'the Lord, the avenger, who says, "To me vengeance, I will repay"' : but hastens to add a qualification which goes near to contradicting all that has gone before : 'unless there be some one who says that the body corporate of the realm and the body of barons ought to do this and may do it in the court of the King himself.' He insists in rhetorical terms on the king's attributes of superiority and power ; but adds, in words which have become famous as an early statement of a vital constitutional principle : 'But the King himself ought not to be subject to man, but subject to God and to the law, for the law makes the King. Let the King, then, attribute to the law what the law attributes to him, namely, dominion and power, for *there is no king where the will and not the law has dominion.*' So, again, the king is subject to his own Court, that is, to the barons and nobles who compose it ; they are associates of the king, 'and he who has an associate, has a master, and therefore if the King be without a bridle . . . they ought to put a bridle upon him'. If the associates themselves are without a bridle, then indeed the king's subjects are in desperate case, and can only 'exclaim and say, O Lord Jesus Christ, bind their jaws with a rein and with a bridle'. This is pure feudalism. It is not until the decline of feudalism that Romanistic sovereignty begins to take definite shape in England. Under the Tudors, Bracton's generalizations about the superiority of the monarch would have been a commonplace ; but it would have been dangerous indeed to maintain the right to 'bridle' the sovereign. In legal theory, the kingship begins to emerge as what Maitland has called 'a juristic abortion'—the corporation sole. The king



serves as a framework for an elaborate structure of 'metaphysical—or we might say metaphysiological—nonsense'. He becomes two persons with two bodies and two capacities, yet with only *one* person! Our law reports begin to shadow forth mystical abstractions excelled in unintelligibility only by 'St. Athanasius. More and more superhuman attributes adhere to the King's Majesty, until they approach dangerously near to blasphemy, and James Stuart frankly 'adorns his person with some sparkles of divinity'. The inevitable reaction took the form of one royal 'martyrdom' and two revolutions, and the crisis of 1688 may be said to have expelled Caesarism from this realm. It dwindled in practice till in another hundred years it had become the shadow of a shade. That it persisted in theory, however, may be sufficiently gathered from Blackstone's account of the royal prerogative. That rhapsodical recital of all the perfections has not even yet wholly disappeared from our constitutional theory, although everybody knows its reality to be none and even its symbolism to be little. The doctrine, of which it is the last echo in our law—a doctrine, perhaps, not truly held by Blackstone, yet reproduced in an imitative manner—is the conception of law as *will* as against the conception of law as *reason*. 'There is no King'—let us recall Bracton's words—'where the will and not the law has dominion.' This law to which dominion is due is the law founded not upon arbitrary command but upon that fundamental Reason which must govern corporate as well as individual conduct.

The revolt  
of ration-  
alism.

Reason is the sovereign, almost the god, of eighteenth-century individualism. That movement was not independent of germinal processes which may be traced back to the Renaissance; for no great movement appears suddenly and unaccountably, like a meteor in the sky; but, as so often happens, the influence of a single mind gave it an impulse which

made its future momentum irresistible. Because he turned men's interest away from the formal problems of academic philosophy towards the infinitely more absorbing problems of living personality, Descartes became, no less than Hobbes, 'the father of modern philosophy'. Though he was not specially concerned with questions of law and government, his exaltation of inalienable, indestructible Reason was difficult to reconcile with the will of a Dantesque *princeps*. John Locke was still in his teens when Descartes died. 'The first books', he said, 'which gave him a relish of philosophical things were those of Descartes.' By the time—nearly the end of his life, and the end of the seventeenth century—that he published the *Essay* which was to be 'the philosophical Bible' of the eighteenth century, Locke has rejected much of Descartes' teaching; but he carries on one torch lit by his predecessor. 'Reason must be our last guide and judge in everything; the subject part of mankind might . . . with Egyptian bondage, expect Egyptian darkness, were not the candle of the Lord set up by Himself in men's minds, which it is impossible for the breath or power of man wholly to extinguish.' Law itself becomes an emanation from a natural order of things, a natural rule of reason, and breach of the law is merely 'varying from the right rule of reason'. The 'state of nature' becomes a state of liberty, not of strife; and the liberty of each member of society can be curtailed only by his own consent in his own interest. Duties as well as rights are of the essence of the sovereign: sovereignty unlimited and irresponsible is not to be admitted under any guise, human, as with Hobbes, or divine, as with Filmer. Even the legislature is restricted by the governing principle that 'these laws ought to be designed for no other end ultimately, but the good of the people'. The royal prerogative itself is merely a form of discretion confided to the executive—a bold precept in 1690, and

a striking anticipation of the doctrine which a great modern teacher has made familiar to all lawyers.

The eighteenth century, then, had ample stimulus towards its gospel of individual will, individual reason, and individual liberty. Finding its evangelist in Rousseau, that gospel forces a trial of strength between the established Caesarism and the new 'general will'. Sovereignty there is in plenty, but it is claimed for the many, not for the one or the few. The *power* of Byzantine supremacy, undirected towards any social or moral end, becomes not only an anomaly but a menace. The State must exercise power not for itself but for its members. This was a direct challenge to the settled tradition of government. It was accompanied by an idealistic optimism, an impetuous faith in human perfectibility and in the irresistible march of progress. Reason, the essence of being, and Liberty, the essence of law, found an incomparable advocate in Kant; the State's duty to the individual took philosophic shape in Fichte. The 'natural progress' of Adam Smith imports a new and complacent optimism into economic theory. Bentham 'compels men to be free'. And dry doctrines of politics are soon to be accompanied by a high harmony of lyricism: Wordsworth is moved to great utterance, Shelley hurls defiance at princes, Byron performs spectacular exploits in the cause of Hellenic liberty.

One of the most remarkable features of Austin's writings is that all these accumulated forces seem to have left him entirely unaffected. He does not revolt against eighteenth-century individualism: he seems to be quite impervious to it. His doctrine is reactionary even in his own day. He carries the reader back to Hobbes and Bodin as if the eighteenth century were a blank page.

The revolt  
against  
ration-  
alism.

A conscious revolt was certain to come from other quarters. Nowhere is it more explicit or more eloquent than in Burke. In the dignified personal references

which close the *Thoughts on the French Revolution*, he justly claims for himself a true love of liberty and a true hatred of oppression throughout his public career; but his sane conservatism inspired in him an equal hatred of unbridled individualism and the vain imaginings of a fictitious 'equality'. In his protest against the exaggerated claims of Ego to take precedence over all other facts of social existence, he stands with the political and theocratical movement of reaction against eighteenth-century individualism. In his insistence on the solemnity and the continuity of tradition, he anticipates the historical school of the nineteenth century. The champion of the American colonists was assuredly no disciple of Caesarism; but his sympathies are closer to the Leviathan than to the General Will.

Bentham's condemnation of the French Revolution was no less severe than Burke's; but the lessons he drew from it were very different. His *Étatisme*, however earnestly it tendered the general and the individual good, is in direct opposition to that of Rousseau; the individual becomes not so much an active contributor to the sum of social good as a passive recipient of benefits; and Bentham hardly stopped to inquire whether material benefits necessarily constitute happiness, or indeed, whether they are benefits at all unless they satisfy conscious desires. In another respect Bentham breaks with the spirit of the eighteenth century. For him no metaphysics, no Cartesian abstractions: the real or supposed origins of society and of the social instinct have no interest for him: he is concerned only to remedy existing disabilities. His idealism relates to the future, in no sense to the past. Yet, as an idealism of perfectibility, it is unlimited. He is perhaps the most remarkable example in literature of an essentially practical mind unconscious of any bounds to the practicable. From this paradoxical temper results the paradox of fact, so well elaborated

by Professor Dicey, that the apostle of individualism was destined to become the founder of State-socialism.

The theo-  
logical  
reaction.

The exaggeration of *homo omnium mensura* invited a theological as well as a political reaction. Even to Burke there is something actually impious in the excessive exaltation of Reason. The French 'theocrats' of the early nineteenth century—Saint Martin, de Maistre, de Bonald, Ballanche, Lamennais—found it necessary to remind overweening man that the only omnipotent Reason in the universe was the Supreme Reason of God, and that he was in danger of arrogating superhuman attributes. God's law in society was not natural equality, but natural inequality, and it behoved man to think upon his frailties rather than upon his excellences, looking to a Higher Power alike for the genesis and the governance of social life.

The  
historical  
reaction.

But this was a partial reversion to mechanical explanations of society. The great counterblast to eighteenth-century 'a-priorism' came not from Faith but from another manifestation of Reason, very different from its predecessor. Even the eighteenth-century doctors themselves were not quite unaware that their theories were built upon prodigious assumptions. Locke, for example, is uncomfortably conscious that an answer is required to the question, 'Where, as a matter of historical fact, is your social contract to be found?' His own answer, however, is mere evasion. The historical movement in jurisprudence may be called the revolt of fact against fancy. Burke adumbrated it in his warnings not to construct schemes for the future without having first assimilated the lessons of the past. In its more scientific aspect, it directed attention not to the abstract ideal, but to the physical environment of law—a theme by no means new, since it formed the core of Montesquieu's teaching, but one which had been forgotten amid the intense speculation of the eighteenth century. A pamphlet produced by an academic controversy recalled men's attention to it with singular force. The

opening passage of Savigny's *On the Vocation of our Age for Legislation and Jurisprudence* summarized a doctrine first suggested by Hugo and now destined to become the starting-point of a new school of thought:

'In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their manners, language and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.'

Ihering said that with the appearance of Savigny's earliest work, *Das Recht des Besitzes*, in 1803, modern jurisprudence was born. A new scientific method opposed a sane scepticism both to the assumptions of the preceding age and to factitious theories of the growth or the reformation of societies. It is difficult for us to realize how novel this attitude seemed to a generation which had not learned, or had forgotten, to regard law and history as vitally interdependent.

Savigny's conception of law is directly opposed to the glorification of individual Reason. The picture he seems to paint is that environmental conditions impel societies along predestined paths to a foreordained end. Whereas the eighteenth century has been more and more chidden for its optimism, the Historical School has been accused of a juristic pessimism. If the rationalists erred in idolizing the future, the historical jurists erred in idolizing the past. They tended, it is said, to hang traditions like fetters upon the hands of reformatory enterprise. Their distrust of legislation, especially when codified, showed a discouraging scepticism of Will and a disbelief in the efficacy of human effort against material surroundings. It is easy to exaggerate this criticism, and exaggeration has not

Savigny's  
'pessim-  
ism'.

been lacking. Savigny's spirit was not that of supine resignation. It is the jurist's business to exercise a 'vivid creative energy' upon inherited conditions.

'The altering of single, nay of many legal doctrines, is doing nothing towards this object [i.e. changing existing legal principles]; for . . . the mode of thought, with the speculation of questions that may arise, will still be influenced by the pre-existing system, and the subserviency of the present to the past will manifest itself even when the present is purposely opposed to the past. There is consequently no mode of avoiding this overruling influence of the existing matter; it will be injurious to us so long as we ignorantly submit to it; but beneficial, if we oppose to it a vivid creative energy—obtain the mastery over it by a thorough grounding in history, and thus appropriate to ourselves the whole intellectual wealth of preceding generations. We have therefore no choice but either, as Bacon says, *sermocinari tanquam e vinculis*, or to learn by the profound study of jurisprudence how to use the historical matter freely as our instrument: there is no other alternative.'

Nevertheless, it is not easy to see how creative energy is to succeed in its aims if there is 'no mode of avoiding this overruling influence of the existing matter': for occasions frequently arise when the existing matter must be deliberately and conclusively overruled. There is, therefore, no small justice in the criticism that Savigny and his school undervalued the function of creative will. As Savigny taught his generation that jurisprudence cannot be divorced from history, so he might himself have been reminded that it cannot be wholly divorced from philosophy. It is impossible to regard human law as a purely material phenomenon. It is not original protoplasm, but a derivative product, and ultimately its source must be conscious Will and Reason, though these are doubtless vastly influenced by the circumstances of environment. However, 'teleology' was not the task which Savigny set himself. That was reserved for another, and perhaps even greater, jurist of the nineteenth century—Rudolf von Ihering.

Savigny's main thesis was how law becomes, not whither it tends, or whither enlightened effort may make it tend. The exclusion of this aspect of law led him and his followers into difficulties, just as the exclusion of history had led the 'a-priorists' into even greater difficulties. But it is the lot of the pioneer of thought, either by overstatement or understatement, to do less than justice to his own case. If his main thesis find acceptance and permanence, he has not wholly failed, whatever modifications subsequent criticism may make necessary. Savigny's main thesis remains substantially unimpaired; and it was a final negation of the unitary sovereign conceived as the sole and inevitable source of law.

Burke and Savigny have been described as 'Darwinians before Darwin'; but Savigny was not very long 'before Darwin'. His last published work appeared only six years before *The Origin of Species*, and he was still alive when that book detonated upon the world. As at the beginning of his life-work a new era opened up in legal history, so at its end a new era, of similar tendency, began in natural history. Evolution, whether philosophically or scientifically considered, was no new doctrine; but the principle of natural selection, formulated as a law and not merely an hypothesis, influenced every department of thought as few scientific doctrines had done before. The 'species question', so wittily described by Huxley, and still within living memory, was no mere learned controversy; 'overflowing the narrow bounds of purely scientific circles', wrote Huxley, 'it divides with Italy and the Volunteers the attention of general society'. Twenty-one years later, the same writer was able to state with confidence that the essentials of the doctrine had established themselves in intelligent opinion as beyond controversy. This is not the place to discuss, even if we were competent to do so, later views and queries; whatever questions may still remain open, it

Juris-  
prudence  
and  
biology.



is at least certain that Darwinian biology has enormously influenced every branch of study since it was first propounded. Jurisprudence, already set upon the path of a new historical method, could not escape that influence. Even the mind uninstructed in principles of natural science could not fail to be impressed, almost awed, by one fact which emerged more and more clearly from the new biology—the extraordinary interdependence of all known forms of life. Daily and with growing astonishment men have learned by what intricate processes organisms, to all appearance unrelated, vitally influence each other in generation, subsistence, and dissolution. When Huxley wrote, he estimated that not less than half a million forms of life were known to science; to-day only a very rash biologist, we conceive, would so much as venture a guess. Among these myriad creatures there is not one which, in the infinite complexities of their mutual action and reaction, *may* not be the cause of far-reaching transformations in natural or human history. Thus the powerful stimulus to biological investigation gave, potentially at least, to every organism, however obscure, an unprecedented importance. Nothing could escape the insatiable microscope.

Sociology  
and the  
'organic  
school':  
and com-  
parative  
juris-  
prudence.

Society became an organism like everything else: the most important organism of all in the view of a new school of students who called themselves 'sociologists'. Even before the Darwinian doctrine had been formulated, Comte had pleaded for the study of social institutions as a *science* with its own technique. However ill he may have succeeded in constructing a system of philosophy, the method he advocated was destined to prove fruitful in other hands. Whether or not 'sociology' has justified the large claims which have been made for it, if we place ourselves in the year 1860 it is not difficult to imagine the stimulus which was given to it by the newly awakened interest in biology. It was the biological aspect of society, suggested by

Darwin, rather than its mathematico-political aspect, suggested by Comte, which inspired the teaching of Herbert Spencer. Doubtless, in the enthusiasm of real or supposed discovery, he carried the method to indefensible extremes. The comparison between the anatomy of an animal organism and of a body politic is instructive and suggestive, and this Spencer successfully demonstrated; but to push the comparison beyond the limits of analogy is to mistake the metaphorical for the actual. Much of Spencer's 'organic' dissection of society reads nowadays like complicated allegory, the more misleading for its very ingenuity. Somewhat cruelly, but not altogether unjustly, M. Bergson has compared his method to that of a man whose sole idea of construction is of fitting together the pieces of a puzzle. Yet, whatever the status to-day of Spencerian theory (and that is a matter beyond our present inquiry), the 'organic' and sociological view was not without its effect on jurisprudence. The interdependence of organisms, in its sociological aspect, means the mutual relations of all members of civilized society, and the distribution of a sense of responsibility far wider than can be comprised within the formula sovereign-and-subject. The Spencerian analysis, it is true, by over-insistence on 'organic' analogies, laid itself open to the charge of being as mechanical as any of its less professedly scientific predecessors. But at least it directed attention to the necessity of considering law in relation to other social phenomena. It remained for Gierke to set against the mechanical operation of real or supposed laws in society the no less dynamic operation of will, and especially group-will. The later generations of sociologists have found it necessary to approach their inquiry with far more regard to psychology than to biology. If there be anything corresponding to biology in jurisprudence to-day, it is to be found in that study of racial origins and early social institutions which for the last sixty years at least has

steadily grown as the science of 'comparative' jurisprudence. 'The science of law', to justify its title, has been obliged to extend its scope far beyond the particular form of Occidental society which was the basis of all analytical jurisprudence. The gaps which still yawn in this comparatively young science, and which have drawn upon it much criticism, are attributable to deficiency of data rather than faults of method. Whatever the doubts and imperfections of modern sociological jurisprudence, whatever problems it may yet have to solve, it appears as the logical outcome of a continuous movement in legal thought which makes it impossible to regard law, a primary function of society, as the product solely of sovereign power.

The  
present  
position  
of juris-  
prudence.

To-day we stand too close to the canvas to discern what the completed picture will be. A network of new relationships between State and individual is the inescapable problem of the present and the immediate future. It has already led to the recasting of political systems all over the world, and the next stage in its transformations defies prevision and exhausts speculation. 'An age of transition' is a term which may be applied to almost any period of history; but it has a peculiar appropriateness to an era following a war of unprecedented dimensions. Jurisprudence, like all else, reflects the widespread uncertainty in which we live. On the one hand, there has been for some years past in France and Germany a vigorous reaction towards idealism, an almost impassioned—perhaps despairing—search for the *constant* of law, the 'natural law with variable content'. On the other hand, we are faced, again in France, with a new kind of materialism, more uncompromising than any of its predecessors; the neo-utilitarianism of M. Léon Duguit appeals for a purely pragmatic test of law, and calls upon us to abandon all traditional notions of State personality in favour of an almighty individualism. In these doubts and conflicts, the twentieth century awaits its Savigny. Whatever

teaching he may impart to his generation, it is safe to predict that one lesson at least of the nineteenth century will not be forgotten: law will never again be looked upon solely as a command, but as a function of society, which, to be understood, must be considered in alliance with the study of the whole structure of society. The difference which a century of jurisprudence has made in our attitude towards the meaning of law may be illustrated by two definitions. At the beginning of the nineteenth century, Austin is able to describe law in the following rectilinear terms: 'A law is a rule laid down for the guidance of an intelligent being having power over him.' *Positive* law is thus 'the aggregate of the rules established by political superiors'. At the beginning of the twentieth century, a distinguished French jurist, Professor François Gény, is unable to confine the definition of law within more strait limits than this:

'Law is the aggregate of rules which govern the external conduct of man in relation to his fellows, and which, under the inspiration of the natural conception of justice, in any given state of the collective conscience of humanity, appear capable of a social sanction with compulsive force, are or tend to be equipped with such sanction, and henceforth take the form of categorical injunctions which control individual wills so as to ensure social order.'

It is not pretended that the second definition is more successful than the first; for what it seeks to gain in comprehensiveness it loses in clarity. But the very effort after comprehensiveness may serve to show how greatly the scope of jurisprudence has expanded, and how impossible it is, in the present state of opinion, to adhere to the fallacious simplicity of the purely analytical standpoint. False simplicity, it may be urged, is at least better than false complexity. But the complexity of modern juristic theory is not false: it is the aggregation of elements diverse, but not on that account superfluous, and there is no need to despair of its

hardening into a greater consistency than it now possesses. Even if it should not prove able to do so, we cannot always demand that that which is not simple in itself should be reducible to simple formulation.

Method of  
regarding  
sources of  
law.

The preceding observations have been directed solely toward showing—since it seems to us essential to the inquiry—that the study of the sources of law cannot be approached with the preconception that they are derived from a single origin, the sovereign. It is a very different matter to say that there is no sovereign at all. As everybody knows, a great deal of current theory is directed to demolishing the whole conception of sovereignty. M. Duguit goes even farther, and calls upon us to abandon all accepted notions of the distinction between the State and the individual. 'Let us have done', he cries, 'with the discussion of the rights and obligations of the individual, of society, of the State, and with the opposition of the individual and society. Society exists only through the individual, there is nothing but individuals living in society, there are no rights and obligations other than those of individuals living in society.' Socialism and individualism, in their current meanings, have no value; every socialistic tendency is properly individualistic, every sane individualistic tendency is at the same time socialistic.' Again: 'For us the State *is man*, the group of men, who in fact in a society are materially stronger than the others.'

Here, as in so many controversies, the issue seems to be one largely of terminology. If by sovereignty is meant the absolutist conception of command from superior to inferior, we may agree that it is entirely inappropriate to modern society. But if by sovereignty is meant a constitutional power set up in a civilized society as part of its social machinery for the enforcement of law, recognized by common consent and obeyed as a necessary instrument of government, entirely different considerations arise. A view now

commonly expressed, and apparently gaining in popularity, is that no such constituted sanction is necessary for law, the true and sole sanction residing in popular recognition. This is a question outside our present purpose. We will only say that there seems to us to be a world of difference between, on the one hand, conceiving a pre-existing unitary sovereign as the source of all law and as a prerequisite to the very existence of law; and, on the other hand, recognizing that in every modern State there must be some ultimate means of enforcing the law which society has developed in the natural process of its growth. Or, to put it in other words, there is a difference between considering law as the creation of the sanctioning power, and considering the sanctioning power as the creation of law. We have endeavoured to show the necessity for regarding law as the product of social forces; that does not in any way preclude us, as lawyers, from requiring a sanction for law among those social forces, when they have reached an appropriate stage of development. We shall, indeed, assume in what follows that a definite sanction of this kind exists in all mature legal systems. But, without entering upon an examination of its elements in different forms of modern States, we regard it as a part, not as the cause, of law: as posterior, not as anterior, to the growth of legal rules. Accordingly we shall be concerned first with those sources which are earliest in social development—custom, interpretation, and equity; and later with the direct influences of constituted political authority—legislation original and subordinate.

# I

## CUSTOM: NATURE AND ORIGIN

### I. NATURE OF CUSTOM

Habit and  
social  
custom.

ALL creatures are creatures of habit. In the lower forms of life, habit is automatic and apparently uncontrollable; we call it instinct, and beyond knowing that it exists and produces extraordinary phenomena, we are unable to explain it. In man, habit is not entirely automatic, though in the more primitive forms of social grouping it is very nearly so. There is not a very vast difference between the automatism of an ant and the tribal habits of an Australian aboriginal; the ant, indeed, in many respects has the better of the comparison. But civilized man possesses a certain degree of individual liberty of choice in the adoption of habits and customs. No more than the ant, however, can he entirely rid himself of customary conduct. The mere existence of a society, the mere plurality of individuals, gives rise to customs from which no single member of the totality can completely divorce himself. Our 'highly-developed' 'civilized' societies of the modern world are just as replete with social customs as the 'primitive' societies of the past or the 'backward' societies of to-day. These customs are doubtless more intelligent and for the most part less superstitious than once they were; but they are just as numerous and just as powerful. In varying degrees they all possess a sanction: to disregard them involves some kind of penalty. It may be slight and in some cases almost ineffectual; but it always exists. Society always takes a revenge for the breach of any of its conventions. No man can be compelled to be moral, as the not infrequent attempts at this kind of compulsion have shown; but the open defiance of

morality involves social reprobation, a severe and often a cruel punishment, except to the few who are content to forfeit social esteem. The real punishment of our criminals lies not in the deprivation of their liberty, but in the stigma which society itself, not the Judge or the jailer, brands upon them. Many would prefer, as a matter of personal comfort, to defy the dictates of fashion, but few are prepared to face the ridicule which defiance involves. A large section of the population of England would consider themselves social outcasts if they did not provide a certain kind of funeral, far beyond their means, for their deceased relatives. The average Englishman could no more be induced to wear his hair long than the average Chinese mandarin could be induced to wear his finger-nails short.

Yet none of these customs is completely obligatory. Their sanction, though in many cases powerful, is imperfect. No man is under an absolute compulsion to visit the barber, or to wear garments of usual design, or to be moral or polite or cleanly or amiable. Legal custom occupies a place by itself in that its sanction is more effectual than that of any other. The effect of the sanction is usually negative rather than positive : if the custom is not followed, certain desired legal consequences will not be effected. Law, backed by the opinion and at later stages by the tribunals of the community, will forbid those relationships to be effected ; in some cases it will go farther, and actually punish the citizen who persists in ignoring a custom. No option, however small, is left to the individual, as in other social customs. A man may, if he chooses, argue that it is a waste of time and money to cut his hair ; in consequence, he may, if he is sensitive, be made uncomfortable, but he will not lose a single right of citizenship or property. He may argue with as much, or as little, reason that the custom of signing, sealing, and delivering a deed is an absurd anachronism ; but if he ignores this quaint survival in a transfer of stock—*nihil agit*.

Legal  
custom  
and its  
sanction.



The  
Austinian  
view.

Most of the customs in modern societies are non-legal and therefore not obligatory, in the fullest sense of that word. Most of the rules which govern legal relationships have by this time been formulated in statutes or decisions; only to a very limited extent do they consist of tacit usages. But it is not difficult either to imagine or to find definite records of early societies in which there is no such explicit formulation of rules. How far in such societies legal custom is a spontaneous growth, and how far it is the creation of individual dominating minds, is a question which we shall have to examine in its place. It is at least certain that in many societies of which we have evidence, before any clearly articulated system of law-making and law-dispensing has developed, the conduct of men in society is governed by customary rules. To call these *legal* rules is perhaps to beg a question, for in very many cases they are equally rules of religion and morality, which have not yet become distinguished from law; but they are 'legal' in this sense, that they are binding and obligatory, and the breach of them is a breach of *duty*. Austin denies them the force of law until they have been expressly recognized by the sovereign. This is consistent with his general doctrine of sovereignty, for without the *cachet* of supreme authority, custom cannot be conceived as a command. The operation of custom in society was, indeed, one of the most formidable obstacles to the whole conception of Austinian sovereignty. There was no escaping the fact that custom was constantly followed and obeyed before ever judicial authority had pronounced upon it.<sup>1</sup> This difficulty was not in any way resolved by calling

<sup>1</sup> The standard definitions of custom in English law never represent it as anything but fully valid and operative law in itself. 'A custom, in the intendment of law, is such a usage as hath obtained the force of a law, and is in truth a binding law to such particular places, persons and things which it concerns. . . . But it is *ius non scriptum*, and made by the people only of such place where the custom is.' Viner, *Abr.* vii. 164, citing *Tanistry Case*, Dav. 31 b.

custom 'positive morality'. The use of that term involved the fallacy of applying to primitive society the terminology and the habits of thought of mature society. In a great many types of early society no distinction can be drawn between positive law and positive morality. On the other hand, in mature societies where the distinction is recognized and where the administration of law is scientifically organized, it is quite unconvincing to say that those who follow a recognized custom are, until the Courts have given that custom their blessing, following a rule of morality. An English merchant in the seventeenth century was *bound*, in any intelligible meaning of that word, in his foreign transactions by rules of the Law Merchant before any Lord Mansfield had told him that he was so bound. At the same time, being perhaps a virtuous, Christian man, he might consider himself bound to love his neighbour as himself. These two rules of conduct would operate in entirely different spheres with entirely different aims and sanctions. Even at the present day, there are throughout the country innumerable trade usages consistently followed in daily practice; very many, perhaps the majority, of them have never been the subjects of any judicial decision. They are followed and obeyed because the *utentes* believe that they must be followed and obeyed in order to effect certain *legal* results. They have no more to do with morality than the Stamp Acts.

Custom  
and  
morality.

[ Custom, as has been said, grows up by conduct, and it is therefore a mistake to lay too much stress upon the element of express sanction by Courts of law or any other determinate authority. The characteristic feature of the great majority of customs is that they are essentially non-litigious in origin. They arise not from any conflict of rights adjusted by a supreme arbiter, not from any claim of *meum* against *tuum*, but from practices prompted by the convenience of society and of the individual, so far as they are prompted by any

Non-  
litigious  
custom.

conscious purpose at all. 'It is not conflicts', it has been said,<sup>1</sup>

'that initiate rules of legal observance, but the practices of every day directed by the give-and-take considerations of reasonable intercourse and social co-operation. Neither succession, nor property, nor possession, nor contract started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of the household on the death of its manager, property began with occupation, possession is reducible to *de facto* detention, the origins of contract go back to the customs of barter. Disputes as to rights in primitive society are pre-eminently disputes as to the application of non-litigious custom.'

The starting-point of all custom is convention rather than conflict, just as the starting-point of all society is agreement rather than dissension.)

1. *The  
Common  
Law as  
custom.*

But it may be said that these considerations are applicable only to primitive societies. It is, however, impossible to understand the true nature of modern law without some knowledge of its origins in social custom. A foreign lawyer, wedded to his code, might challenge this proposition; but the English lawyer who has to deal constantly with the Common Law will not find it startling. For what is the Common Law? Assuredly it is not merely an agglomeration of spontaneous customary rules, unless we are to ignore the vital influence of judicial interpretation upon our law.<sup>2</sup> But neither is it primarily the artificial creation of expert minds, as are codes and statutes. Its roots strike deep into the soil of national ideas and institutions.) 'Habent enim Anglici', says Bracton,<sup>3</sup> 'plurima ex consuetudine quae non habent ex lege': and it is not without significance that he did not adopt Azo's term *ius* for the whole English system, but was careful to call it 'lex et consuetudo'.<sup>4</sup>

Bracton.

<sup>1</sup> Vinogradoff, *Historical Jurisprudence*, i. 368.

<sup>2</sup> See *post*, pp. 81 ff.

<sup>3</sup> F. 1.

<sup>4</sup> *Lex* is to Bracton *lex scripta*, emanating from sovereign authority; and we may see again his hesitation between Bolognese and feudal

Blackstone, in a well-known passage,<sup>1</sup> has attempted to define the Common Law of England:

‘This unwritten or common law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adapted and used by some particular courts, of pretty general and extensive jurisdiction.’

He gives a number of examples and then describes them as ‘all these doctrines which are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support’.

The ‘particular customs’ to which Blackstone refers have had a greater importance in the past than at the present time, especially in the feudal land law; but they are by no means unimportant even to-day, and in one sphere at least, commercial law, ‘particular’ usages are constantly before the Courts. Something will be said later of their nature and application.<sup>2</sup>

tradition, already noticed (*ante*, p. 11), in his doubts as to how far the *consuetudines* which the Common Law was absorbing deserve the full title of ‘law’. He solves the problem by insisting that the *consuetudines* should be the sanctioned product of royal authority or its representatives (Council or Court), not of casual uninstructed opinion: ‘cum legis vigorem habeat quicquid de consilio et consensu magnatum et reipublicae communi sponione, auctoritate regis sive principis praecedente, iuste fuerit definitum et approbatum’ (i. 1). This compromise, even allowing for the centralizing influence which the Royal Courts were steadily exercising over local custom, does not completely account for the operative force of the innumerable *consuetudines* (which Bracton goes on to recognize specifically) ‘in diversis comitatibus, civitatibus, burgis et villis’.

<sup>1</sup> 1 *Comm.* 67.

<sup>2</sup> *Post*, pp. 86 ff. The very important part played by borough customs in the development of our general law has received less than its due share of attention from English students, but has been greatly illuminated by Miss Mary Bateson’s invaluable collection of *Borough Customs* (S.S., vols. 18 and 21). See also Holdsworth, *H. E. L.* ii. 372 ff.

Black-  
stone :  
particular  
and  
general  
customs.

Blackstone's 'general customs' or 'customs of the realm' are those fundamental principles in legal relationships which for the most part are not to be found in any express formulation, but are assumed to be inherent in our social arrangements. They are, in short, the Common Law itself.<sup>1</sup> Their origin, discoverable only in social practices of which we have, at most, fragmentary evidence, is necessarily obscure. There has sometimes been too great a tendency to frame *a priori* generalities about them, and to attribute them to unseen, mystical agencies when very often they can be traced to quite definite human invention. St. German says of them in *Doctor and Student*:<sup>2</sup>

'And because the said customs be neither against the law of God, nor the law of reason, and have alway been taken to be good and necessary for the commonwealth of all the realm; therefore they have obtained the strength of a law, insomuch that he that doth against them doth against justice: and these be the customs that properly be called the *common law*.'

But, as we shall see,<sup>3</sup> a good many of the examples he gives are attributable not to any primordial law of God or reason or necessity, but, in a very great measure at least, to the inventive intelligence of Bench and Bar.

Family Law. But there are many principles of our Common Law which undoubtedly have their roots purely in social custom. This is especially true of the most fundamental social custom of all—Family Law.) Monogamy itself is tribal custom, influenced, but not created, by Christianity. It is true that we have enacted

<sup>1</sup> In some of the old cases, a distinction is drawn between common custom and Common Law. Thus in Hobart's report of *Rich v. Kneeland* (1613), 1 Hob. 17, a note to the judgement observes: 'And it was resolved that, though it was laid as a custom of the realm, yet indeed it is common law.' The distinction is not clear, but seems to mean that the rule in question was not merely one of popular observance but had been sanctioned by the Courts. The 'custom of the realm' in regard to common carriers and innkeepers is indistinguishable from Common Law, and is almost entirely the product of judicial decisions. See Littleton J., App. B, *post*, p. 361.

<sup>2</sup> Chap. VII.

<sup>3</sup> *Post*, p. 82.

ceremonials for marriage, that bigamy or polygamy is a crime in England, and that we refuse to recognize polygamous marriages in our Courts, even when they have been contracted in countries where polygamy is lawful.<sup>1</sup> But the custom of monogamy goes back to the earliest known social origins of our race. It is, again, purely by custom that a wife takes her husband's name. In France this rule has been enacted by a law of 6th February 1893. Nobody has ever thought it worth while to give it statutory form in England, but it would be fantastic to doubt that it is the settled law of the land.<sup>2</sup> And so throughout the greater part of our familial law. Parental authority, the rights of guardianship, control and education, are not only customary, but belong so peculiarly to the father as 'master of his own house, king and ruler in his own family' (the words are those of the Court of Appeal), that the Courts will interfere with them as little as possible.<sup>3</sup> The father cannot, except on an actual separation of the spouses, voluntarily surrender these fundamental rights over and duties to his offspring; nor can a mother do so in respect of her illegitimate child.<sup>4</sup>

It is a constant source of wonder to foreigners that our law is built up to so great an extent on *assumptions*: that in the most fundamental matters (in spite of Austin) there are so few direct commands and prohibitions.<sup>6</sup> Where shall we find any sovereign rule which

The assumptions of the Common Law.

<sup>1</sup> *Hyde v. H.* (1866), L.R. 1 P. & D. 130; *R. v. Naguib*, [1917] 1 K.B. 359, 360; cf. *Warrender v. W.* (1835), 2 Cl. & F. 488; Dicey, *Conflict of Laws* (3rd ed.), 289; Foote, *Private International Law* (5th ed.), 130.

<sup>2</sup> There is but scanty direct judicial authority on the point; but see *Fendall orse. Goldsmid v. G.* (1877), 2 P.D. 263, and *Cowley v. G.*, [1901] A.C. 450. The custom is said to vary in Scotland and Spain: see Hals. *L. of E.* xxi, § 621.

<sup>3</sup> *Agar-Ellis v. Lascelles* (1878), 10 Ch.D. 49, 75. But see *Ward v. Laverty*, [1925] A.C. 101.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Humphrys v. Polak*, [1901] 2 K.B. 385.

<sup>6</sup> 'Nine-tenths, at least, of the law of contract, and the whole, or

expressly defines and forbids assault, or libel, or false imprisonment, or negligence? Not only the Judges, but Parliament itself, in regulating such matters of civil liability, constantly assume an hypothesis of existing law: for example, an inquirer will search in vain the important statutes relating to libel for a definition of that very common tort. It would never occur to the House of Commons to lay down what constitutes actionable negligence in law; the conception of duty which underlies it is rooted far deeper than any English statute seeks to go. In Criminal Law, it is true, a wider field has been covered by legislation. Indeed, so much of our Criminal Law has now been embodied in statute, that there seems to be no very cogent argument against the codification of the whole Criminal Law. In some cases, statute has filled up gaps in the Common Law by 'new' crimes, like embezzlement, false pretences, publication of false balance sheets, and the like. But the foundations of criminal liability are still firmly embedded in the Common Law, and to this day our statute-book contains no definition of the second-highest crime known to the law, and the most shocking known to humanity—wilful murder. The definition of this crime which is to be found in Coke, and in any treatise on Criminal Law, is a mosaic of principles put together through ages of practice and interpretation. In all branches, the assumptions on which our law is built up are so many and so vital that it is tempting to regard them all as spontaneous outcrops of the national genius. This, as we shall see, is not entirely true; but it is more nearly true than the conception of them as commands, direct or indirect.)

Constitutional  
Law

Again, nowhere are custom and convention more operative than in the very machinery of English government itself.) 'Constitutional Law' is correctly, indeed inevitably, described by our writers as 'The nearly the whole, of the law of torts, are not to be discovered in any volume of the statutes': Dicey, *Law and Opinion in England*, 360.

*Law and Custom of the Constitution*. To say truth, this branch of our law—if it can properly be considered a separate branch—contains a great deal more custom than law, as those terms are used. It is unnecessary to insist that the very hinge of the Parliamentary system—Cabinet government—has grown up in the main by usage, and by usage is at this moment visibly changing its character. It and its head, the most responsible individual in the kingdom, remain extremely elusive and ill-defined in our formulated law. We cannot advance a step in Constitutional Law without inquiring into ‘Parliamentary practice’, which frequently has no explicit sovereign sanction whatever, and yet is of the utmost moment to the system of government. Too often we forget that these tacit *de facto* usages limit materially the so-called absolute sovereignty of the legislature.<sup>1</sup>

English lawyers are constantly reminded of the force of custom in other legal systems beside their own. This does not apply in the same degree to lawyers of other European countries. French jurists, for example, may have to deal occasionally with the native law of Algeria and other colonies; but local usages are overshadowed by the Code, and custom is hardly considered a source of law at all. Its study has, indeed, been strangely neglected by French jurists, and it is comparatively recently that their interest in it has been awakened, chiefly by Professor François Géný of Nancy. The Civil Code prescribes no method of proof and no period of antiquity for custom, though it is bound to recognize the numerous commercial customs which exist in French society as in all others; and the rules of interpretation which have grown up round these mercantile usages have gradually been extended to customs of all kinds.<sup>2</sup>

<sup>1</sup> See *post*, p. 262.

<sup>2</sup> *Code Civ.*, Arts. 1135, 1159, 1160; Géný, *Méthode d'Interprétation*, i. 317 ff.

2. Foreign custom.



But the Englishman who has to administer law in India, or to practise before the Privy Council, cannot be unconscious of the part which custom has played and still plays in the legal development of civilizations even more complex than his own. It is well known that acquaintance with Indian customary law first inspired Sir Henry Maine to enter upon his researches into the growth of law, and consequently to put a new complexion on the accepted English dogmas on this subject. But a lawyer in India hardly needs the writings of historical jurists to remind him that custom is a vital legal element in the society with which he has to deal. It is a fact self-evident in innumerable relations of everyday life. [The authority of legislation as we understand it (that term of course not including sacred declaratory codes) is a very modern phenomenon in Indian society and is almost entirely due to importation from outside. It was a method of government virtually unknown to the Hindu rulers. 'The great body of existing law', says Mayne,<sup>1</sup> 'consists of ancient usages, more or less modified by Aryan or Brahmanical influence.' The Code of Manu gives the utmost authority to custom, even as against revealed and sacred law; for it is the duty of pundits and rulers alike to found their ordinances upon immemorial usage, 'the root of all piety'. They must have regard not merely to the sanctioned practices of virtuous men, though these possess a special validity, but to 'the usages of castes, of districts, of guilds, and of families'.<sup>2</sup> If we dilute the pietistic terminology of sacred, 'inspired' literature, the sanctity of custom means that immemorial usage is deemed to be based on a fundamental reasonableness,<sup>3</sup> though not in every instance on what

<sup>1</sup> *Hindu Law and Usage* (8th ed.), 47. On the whole subject, see Roy, *Customs and Customary Law in British India* (Tagore Lectures, 1908).

<sup>2</sup> i. 108, 110; viii. 41; and cf. ii. 6, 12, 18, 20; iv. 115, 156, 179; viii. 46; *Sacred Books of the East*, ed. Max Muller, vol. xxv; Roy, *op. cit.* 15.

<sup>3</sup> The 'custom of virtuous men' is indeed nothing else than the

Western ideas would regard as a fundamental morality.<sup>1</sup> The general principles laid down by the Code of Manu have been consistently followed and extended by all the authoritative commentators.<sup>2</sup> From the outset, British rule has recognized the scope and validity of native custom, and as early as 1781<sup>3</sup> the legislature expressly 'saved' local custom where it differed from the general law; and in 1868, in a leading case,<sup>4</sup> the Judicial Committee of the Privy Council affirmed the principle in the most express and solemn terms. Though during the course of the nineteenth century the bulk of British law in India has been codified, the inviolability of custom has been repeatedly maintained both by the general law and by the legislation of different provinces—always provided, it need hardly be said, that the necessary judicial tests are satisfied. These tests are in the main the same as those applied to English customs;<sup>5</sup> but they are applied more frequently, because they occupy a larger place in the life of the people and because of a complexity of races, castes, and religions unknown in English civilization. Especially in regard to inheritance their intricacies are many and difficult. The large number of British lawyers who constantly have to deal with them as part of the British legal system, and not merely as exotic curiosities, can entertain no doubt as to the huge vitality of custom as a source of law and as a rule of conduct quite unrelated to any sovereign authority in the Austinian sense.

'custom handed down in regular succession since time immemorial among the four chief castes': ii. 18, and cf. iv. 178.

<sup>1</sup> Thus prostitution is recognized by Hindu law among some classes (dancing-girls in pagodas) and gives rise to certain questions, of which English Courts take cognizance, of adoption and inheritance. On the other hand, it is sternly discountenanced by Mohammedan law.

<sup>2</sup> Roy, *op. cit.* 15. Narada, i. 40, goes to the furthest limit: 'Custom is powerful and overrules the sacred law.'

<sup>3</sup> 21 Geo. III, c. 70, s. 17; and cf. Indian Regn. IV of 1793, s. 15.

<sup>4</sup> *Collector of Madura v. Mootoo Ramalinga*, 12 Moo. I.A. 397.

<sup>5</sup> See App. A, p. 357.

## II. ORIGIN OF CUSTOM

No problem of jurisprudence, except perhaps that of corporate personality, has given rise to more lively controversy than the origin of custom. The difficulties of the inquiry are, first, that it necessarily deals with early social phenomena not determinable by positive evidence, and second, that the motive forces which it has to consider, both in the individual and in society, are in a large measure psychological and impalpable.

*Theory  
of custom  
in Roman  
Law.*

We turn naturally to the world's greatest legal system for guidance as to the rise and scope of custom; but here Roman jurisprudence is singularly indistinct.<sup>1</sup> Throughout the *Corpus Iuris* custom appears in connexion with institutions of widely different kinds, and it is extremely difficult to construct any consistent theory, so obscure and often contradictory are the references. Two main titles, D. 1. 3 and C. 8. 52, deal specifically with the topic: the latter is laconic, and as for the former, there is probably no title in the Digest which shows so little homogeneity and which has been the centre of so much discussion. Not inaptly the gloss upon C. 8. 52 observes: 'Sed quae est longa consuetudo? Licet enim rubrica quaerat, non tamen solvit lex huius tituli.'

*The  
genius of  
Roman  
Law un-  
sympa-  
thetic to  
custom.*

Custom inevitably raises questions of historical origins, and from its very nature the *Corpus Iuris* could deal with historical origins only in the barest outline, as in the well-known sketch of Pomponius in

<sup>1</sup> The actual customary origins of many institutions of Roman Law form an attractive question of historical jurisprudence, on which much valuable work has been done and continues to be done by modern civilians: see, e.g., Pernice's criticisms of Brie, *Die Lehre vom Gewohnheitsrecht*, in *Z. S. S. (Röm. Abth.)*, xx. 127, and Ehrlich's views, mentioned *post*, p. 80. This problem is, however, beyond the scope of our present inquiry, and the observations here made are concerned with the juristic theory (so far as formulated) of custom in classical Roman Law, rather than with the historical growth of tribal and customary institutions among the Romans and their subject peoples.

- D. 1. 2 (*De Origine Iuris*), which is a masterpiece of concision rather than of illumination.<sup>1</sup> Further, the habit of mind, as well as the professional practice, of the jurists did not incline them to the discussion either of abstract questions of jurisprudence or of legal antiquities. They themselves were habitually concerned with technical interpretation, and their primary business was with formulated law, not with the *de facto* law of customary observance.<sup>2</sup> It was accepted as a fact of general recognition, though of somewhat academic interest, that the original law of Rome had been customary; but this historical postulate is of more moment to the orators and historians than to the jurists.<sup>3</sup> The tradition of codification early enters the legal field, first with the semi-legendary<sup>3</sup> *Leges Regiae*, and next with the Twelve Tables. The Twelve Tables inaugurate an enormously long period—some thousand years—of juristic and praetorian interpretation, not to mention republican and imperial legislation, and all circumstances strongly combine against the growth of a general customary law throughout the Empire. Nor would it have been at all compatible with the absolute sovereignty of the later Empire, especially with the final codification of Justinian. That local and peregrine custom must have played an important part in the heterogeneous Byzantine Empire was long believed but never sufficiently understood until L. Mitteis explored

<sup>1</sup> Brie, *op. cit.*

<sup>2</sup> The *locus classicus* is *Cic. de Inv.* ii. 65 ff.: 'initium ergo eius (i.e. iuris) ab natura ductum videtur; quaedam autem ex utilitatis ratione aut perspicua nobis aut obscura in consuetudinem venisse; post autem approbata quaedam a consuetudine aut a vero [utilia visa] legibus esse firmata', &c. Cf. D. 1. 2. 2. 1: 'populus sine lege certa, sine iure certo', &c.

<sup>3</sup> Though beyond doubt an actual code, of origin probably traditional and sacerdotal rather than regal or comitial: Girard, *Textes de Droit Romain*, 1 ff. It is characteristic of classical jurisprudence that Pomponius dogmatically impresses these laws with the seal of sovereign authority: D. 1. 2; Girard, *ibid.*

the subject.<sup>1</sup> There are numerous references in the Corpus Iuris to a *consuetudo loci*,<sup>2</sup> *consuetudo provinciae*,<sup>3</sup> *mos provinciae*,<sup>4</sup> *consuetudo regionis*,<sup>5</sup> and *mos regionis*,<sup>6</sup> but their exact meaning is still matter of great doubt.<sup>7</sup> Nevertheless, while an explicit theory of custom is absent from the surviving sources of Roman Law, its recognition in a great variety of circumstances leaves no doubt as to its practical importance.<sup>8</sup> *Usus*, though omitted by Gaius, is definitely inserted by Justinian in his enumeration of the sources of law.<sup>8</sup> *Mos*, *mores*, and *consuetudo* are terms of considerable frequency throughout the Corpus Iuris, and at first sight appear to be used interchangeably. On closer examination, however, it seems clear that *mos* refers to something more primordial and less tangible than *consuetudo* and *usus*, which resolve themselves into the actual practice and observance of custom. (*Mores* are those general habits of life, that disposition towards certain institutions (patriarchy is the most conspicuous example),<sup>9</sup> which reside in the character of the Roman people.<sup>10</sup> In the Savignian theory they would be closely identified,

Mos, con-  
suetudo,  
and con-  
sensus  
utentium.

<sup>1</sup> *Reichsrecht u. Volksrecht in den östlichen Provinzen des römischen Kaiserreichs*, 1891.

<sup>2</sup> D. 2. 12. 4; 3. 4. 6. 11.

<sup>3</sup> D. 22. 5. 3. 6.

<sup>4</sup> D. 26. 7. 7. 10.

<sup>5</sup> D. 18. 1. 17; 21. 2. 6.

<sup>6</sup> D. 22. 1. 1. pr.; C. 4. 65. 8.

<sup>7</sup> See Brie, *op. cit.* 21-2.

<sup>8</sup> Inst. i. 2. 9. Of the various institutions referred to in the Corpus Iuris as founded purely on custom, the following may suffice as illustrations: D. 49. 15. 19. pr. (*postliminium*: here *mores* are equated to *naturalis aequitas*); D. 50. 13. 5. 1 (*existimatio*); D. 27. 10. 1 (interdiction of prodigal); D. 28. 6. 2 (pupillary substitution—cf. Inst. 2. 16. pr. and D. 29. 2. 8. pr.); D. 24. 1. 31 (gifts between husband and wife). It is noteworthy that all these passages except the first two are from Ulpian, who seems to have attached greater importance to custom than any other jurist. Gaius mentions succession by adoption as having been introduced 'eo iure quod consensu receptum est', iii. 82; and 'pignoris capio', iv. 26-7.

<sup>9</sup> Gai. i. 55; Inst. i. 9. 2.

<sup>10</sup> The peculiarly Roman colouring sometimes appears in the expression 'mos (mores) civitatis' or 'nostrae civitatis': D. 29. 2. 8. pr.; 18. 1. 34. 1; 50. 16. 42.

it may be presumed, with the *Überzeugung*; and this 'conviction' is expressed in the language of the jurists in the oft-repeated doctrine of the *consensus utentium*. That doctrine finds perhaps its most explicit, certainly its most succinct, formulation in the definition of Ulpian: 'Mores sunt tacitus consensus populi, longa consuetudine inveteratus.'<sup>1</sup> Similarly Cicero expresses the conventional view: 'consuetudine autem ius esse putatur id, quod voluntate omnium sine lege vetustas comprobavit.'<sup>2</sup> The conception of custom as based on consent, a corporate act of will on the part of the people, automatic rather than express,<sup>3</sup> becomes an almost tedious formula of the jurists; its exact nature and process they do not seem to have examined, any more than the apostles of the Social Contract examined the actual mechanics of consensus in their supposed contract. The doctrine becomes the less convincing in view of the fact that the same foundation of popular consent was assumed, constitutionally and legally, to lie at the base of all legislation:<sup>4</sup> a theory which throughout the Empire steadily diminished in verisimilitude, and certainly under the absolute monarchy was no better than a fiction.

Yet if it is dangerous to base customary practices on any elements of deliberate will and consent, it is easy to see that the *consensus* which the Roman writers really had in mind was that uniformity or unanimity of practice which is necessarily characteristic of custom. Nowadays we say that this uniformity is founded on an *opinio necessitatis*, an involuntary acceptance of the custom as being *obligatory* in order to achieve a certain end. No such doctrine is explicit in Roman theory;<sup>5</sup> but just as

Reason-  
ableness.

<sup>1</sup> *Reg. Pr.* 4.

<sup>2</sup> *De Inv.* ii. 67.

<sup>3</sup> 'Velut tacita civium conventio', D. i. 3. 35 (Hermogenian).

<sup>4</sup> Most notably in D. i. 3. 32. 1 (Julian): 'ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt.' It may be, however, that the *leges* here referred to are republican, not imperial.

<sup>5</sup> Brie, *op. cit.* 23.

there is a supposed consensus in the adoption of custom, so that consensus itself is based upon a reasonable social necessity, which is expressed as the 'ratio quae suavit consuetudinem'.<sup>1</sup> This inherent reasonableness, associated, it would seem, with an objective utility rather than a subjective logic, is a necessary element in all custom entitled to judicial consideration; and although there is no clear doctrine that *error* and *irrationality* in its inception are sufficient to invalidate a custom actually observed in practice, such a usage must not be admitted as a valid precedent for other similar usages.<sup>2</sup>

Antiquity. If *mos* and *ratio* are the *inner content* of custom, *consuetudo* is its actual practice, and emphasis is constantly laid on the antiquity and frequency of that practice. Custom is almost invariably conceived by the jurists as *perpetua* or *inveterata*, and it is doubtful whether any custom of recent origin came within their purview at all. However supreme the imperial formulation of law, there is a natural, prudential desire not to remove the ancient landmark. This temper is well illustrated

<sup>1</sup> C. 8. 52. 1: 'nam et consuetudo praecedens et ratio quae consuetudinem suavit custodienda est.' The same doctrine appears in non-juristic writings: e.g. Quintilian, *Inst. Or.* v. 13: 'qua persuasione etiam si non omnium hominum, eius tamen civitatis aut gentis, in qua res agitur, in mores recepta sunt.' Cf. Cicero, *de Inv.* ii. 65 (*utilitatis ratio*).

<sup>2</sup> Such appears to be the meaning of Celsus in D. 1. 3. 39, taken in conjunction with Paulus, D. h.t. 14: 'Quod non ratione introductum, sed errore primum, deinde consuetudine optentum est, in aliis similibus non optinet'; and Paulus: 'Quod vero contra rationem iuris receptum est, non est producendum ad consequentias.' Further, Julian, D. h.t. 15: 'In his, quae contra rationem iuris constituta sunt, non possumus sequi regulam iuris.' These are dark sayings, but I follow Brie, *op. cit.*, in interpreting them to mean that a custom contrary to the ordinary *ratio iuris* may not be bad in itself (Julian certainly seems to imply this) but, in modern phrase, 'is not to be extended' *ad similia* or *ad consequentias*. It exists, in short, only on sufferance and somewhat under displeasure. On the other hand, C. 8. 52. 2 is emphatic that custom cannot be valid *ut rationem vincat*. On the general theory of the reasonableness of custom, see *post*, pp. 95 ff. and App. B, p. 359.

in the correspondence of the younger Pliny. Pliny inquires whether senators appointed in Bithynia contrary to a technical provision of the Lex Pompeia are to be deprived of their offices; though the statute is clear, he hesitates to act according to the rigour of the law when a custom, though by no means *inveterata*, has established itself to the contrary. Trajan sympathizes with his doubt, and gives the diplomatic reply that existing appointments shall not be annulled but that for the future the statute shall be strictly observed.<sup>1</sup> In the case of inveterate custom not opposed to any statute, the conservative tendency would naturally be even stronger; indeed the Judge is expressly forbidden to ignore it.<sup>2</sup> What exactly constituted antiquity in law was never definitely laid down. It is probable that in the absence of any positive rule Judges, especially in the provinces, must have found themselves sometimes embarrassed, and this doubtless was the reason for the constitution of Leo and Zeno in A. D. 474, providing that in case of doubt as to the antiquity of any particular custom, the magistrate should have recourse to the decision of the emperor.<sup>3</sup>

As to the actual operation of custom in the scheme of Roman Law, modern students are left in great doubt owing to their inevitable ignorance of the practice of the Courts.<sup>4</sup> But it is evident throughout the leading titles of the Digest and Codex, as well as in many other references, that the place assigned to custom as an

Scope of  
operation.

<sup>1</sup> *Epist. ad Traianum*, cxiv and cxv.

<sup>2</sup> D. 1. 3. 38; Inst. 4. 17. pr.; D. 22. 5. 3. 6; and (strongest) C. 8. 52 ('ne quid contra longam consuetudinem fiat'). <sup>3</sup> C. 1. 14. 11.

<sup>4</sup> Only one passage of Ulpian (D. 1. 3. 34), and that highly obscure through its unusual and probably corrupt expression 'contradicto iudicio', seems to suggest that judicial recognition was a prerequisite to the validity of custom. But the practice of the Courts in taking cognizance of and testing alleged customs must have been extremely important. Unfortunately, we have only indirect and vague references to the 'mos iudiciorum' in this connexion, and these are to be found in the orators rather than the jurists: Brie, *op. cit.* 52 ff., citing Savigny, *System*, i. 148, n. (h.) hereon.



operative source of law was by no means unimportant: so much so that it is difficult to understand why the subject did not receive a more systematic exposition. Like the *ius honorarium*, it supplements the written law, and is a self-contained authority where statute is silent.<sup>1</sup> Besides thus filling the interstices in the enacted law, it may serve to interpret statutory provisions, especially when they are conflicting or ambiguous; thus Paulus's famous maxim, 'Optima est legum interpret consuetudo'.<sup>2</sup> And though it is to be gathered from express references and from the general tenor of imperial legislation that custom could not be allowed to prevail against definite statutory provision or (more doubtfully) the *ratio iuris*,<sup>3</sup> yet in one respect we find a larger function ascribed to it than our own law has ever admitted.<sup>4</sup> In spite of conflicting evidence in the sources, there seems little doubt that the negative aspect of *consuetudo*—i. e. *desuetudo*—was recognized as definitely and properly abrogative of statute. Julian is explicit on the point in D. 1. 3. 32. 1, and still more conclusive is the general rule stated in Inst. 1. 2. 11: 'Ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.' This is confirmed, if confirmation be necessary, by the frequent mention in the Corpus Iuris of statutes which have fallen into disuse.<sup>5</sup> But

<sup>1</sup> D. 1. 3. 32 (Julian): 'De quibus causis scriptis legibus non utimur . . .'; D. h.t. 33 (Ulpian): ' . . . in his quae non ex scripto descendunt.' Cf. Tertullian, *De Corona*, 4: 'Even in civil matters custom is received instead of law, when positive legal enactment is wanting (*cum deficit lex*)' (Antonicene Library, *Writings of Tertullian*, i. 337). As to legal institutions attributed solely to customary origin, see *ante*, p. 40, n. 8.

<sup>2</sup> D. 1. 3. 37; cf. D. h.t. 38, ' . . . in ambiguitatibus quae ex legibus profiscuntur'.

<sup>3</sup> C. 8. 52. 2. Nov. 134. 1 is an example of the express prohibition of custom: ' . . . neque vero consuetudines nominare aut quaerere, quas forsitan aliqui praedecessorum in proprium lucrum iniuste adinvenerunt.'

<sup>4</sup> See *post*, p. 87.

<sup>5</sup> D. 9. 2. 27. 4 (second chapter of Lex Aquilia) (cf. Inst. 4. 3. 12);

the divestitive legal period of desuetude seems to have been as much at large as the vestitive period of consuetude; at all events, the available sources do not attempt to establish any standard. We may suppose without rashness that it required even stricter proof than the *vetustas* of custom, for it is improbable that the imperial will would have brooked so formidable a check except within well-defined limits, and only when the inefficacy of the abrogated enactment had been unmistakably proved in practice.<sup>1</sup>

[It will be seen that in Roman theory custom, as a source of law, occupied a considerable place. It may well be doubted whether any Roman jurist would have gone as far as Austin in denying it any legal validity save in so far as it was derived from or sanctioned by a determinate sovereign. On the other hand, so far as there is any consistent theory of custom at all, it is clearly relegated to a subordinate position among the sources of law, and with the single surprising exception of its abrogative effect upon statutory law, was not conceived as competing on equal terms with the authority of constitutional law-making organs.] It is not, indeed, until comparatively recent times that custom has been erected to a primary place among the materials of law.

2. *The Historical School.*

] To the German Historical School all law is essentially the product of natural forces associated with the *Geist* of each particular people, and nothing is more representative of these evolutionary processes than the autochthonous customs which are found to exist in each community, and which are as indigenous as its flora and fauna. Custom carries its own justification in itself, because it would not exist at all unless some D. 11. 1. 1. 1 (interrogatories to heir-claimant); Inst. 1. 5. 3 (*dedicti*); Inst. 4. 4. 7 (XII T. penalties for *iniuria*); C. 6. 51. 1. 1 (*Lex Papia*); Nov. 89. 15 (a constitution of Constantine ' [de naturalibus suis] non utendo perempta est '). The desuetude of the XII Tables, and of statutes in general, is discussed with spirit in Gellius, *Noct. Att.* xx. 1. 9 ff.

<sup>1</sup> Brie, *op. cit.* 37 ff.

deep-seated need of the people or some native quality of temperament gave rise to it.' Savigny might well have said of custom, 'Whatever is, is right'. This is his own account of it:<sup>1</sup>

'The true basis of positive law . . . has its existence, its reality, in the common consciousness of the people. This existence is an invisible thing; by what means can we recognize it? We do so when it reveals itself in external act, when it steps forth in usage, manners, custom; in the uniformity of a continuing and therefore lasting manner of action we recognize the belief of the people as its common root and one diametrically opposite to bare chance. Custom therefore is the badge (*Kennzeichen*) and not a ground of origin (*Entstehungsgrund*) of positive law.'

Puchta carried the principle even further. To him custom was not only self-sufficient and independent of legislative authority, but was a condition precedent of all sound legislation. He found the basis of customary law in the collective purpose of the nation, and express legislation could be useful only in so far as it embodied this purpose as already manifested in custom. From this view arose the distrust with which the Historical School regarded all legislation, especially when in the form of a code.

The  
*Volksgeist*.

\ The starting-point is a *Volksgeist* which exists *de facto* and must be accepted, without any attempt to explain it, as a natural phenomenon. It is primarily a sociological, not a legal, fact: law is but one among many of its manifestations. But custom comes early among those manifestations, and it is essentially a reflex of the *Geist*. In itself it creates nothing. It is not the hammer, it is the spark struck from the anvil. Its effect is to *make known* the existing *Geist*. 'Die Gewohnheit macht das Recht nicht, sie lässt es nur erkennen.' In reality, it is *instinct* coming to the surface in practical relationships. That particular instinct in the general *Geist* which applies to legal arrangements

<sup>1</sup> *System*, § 12, Holloway's trans.

is the *Rechtsüberzeugung* or *Rechtsbewusstsein*. [ It would seem to include not only an instinct for a particular kind of legal institution, but also a general consciousness of right and wrong as expressed in legal arrangements. All law, whether applied by Judges or ordained by the sovereign, must accord with this native *Rechtsüberzeugung*; else it is misconceived, pernicious, and doomed to failure. The effort of every enlightened legal system should be to dispense the law which was and which is and which is to be; artificial inventions are justified only when pressing new needs arise in society. It is true that in the application of the indigenous law human agents must intervene; but their business is to dispense what they find and to add nothing to it. Custom is above all else a *rule of conduct*; Judges and interpreters are concerned with logical decisions, not with rules of conduct. ] The origin, the self-contained validity of custom is an entirely different question from its application, and the two things should never be allowed to merge. And even when the interpreter has to exercise his individual judgement in the disputes which are certain to arise as to the meaning of law, he does so as 'the representative of the people'. He, too, must come within the ambit of the *Volksgeist*, and he is a just and useful Judge only in so far as he adheres to its dictates in forming his conclusions.

The merest glance at these summarized principles, which I hope accurately represent the main purport of Savigny's teaching, is sufficient to show their deeply sociological colouring. If Savigny was an evolutionist before the evolutionists, so was he a sociologist before the sociologists. But the difficulties which reside in his doctrine, if it be accepted unqualified, are many and serious; and, especially when he came to consider the *Juristenrecht*,<sup>1</sup> he had much ado to remain consistent with his own principles.

Many customs which have taken deep root in society

<sup>1</sup> See *post*, pp. 69 ff.

Customs  
of ruling  
classes.

do not appear to be based on any general conviction as to their rightness or necessity, or upon any real and voluntary *consensus utentium*. Slavery was the almost universal practice of the ancient world. It was not, however, accepted without stern criticism from those who concerned themselves with its moral, as opposed to its merely utilitarian, aspects. It is true that Plato shows towards it a complacency somewhat surprising to the modern student; he treats it as an institution universally admitted to be useful,<sup>1</sup> and contents himself with good counsels as to the humane treatment of slaves.<sup>2</sup> Before Aristotle, and contemporaneously with him, the ethics of slavery appear to have been debated with some liveliness;<sup>3</sup> and Aristotle specifically examines the arguments in a well-known passage of the *Politics*.<sup>4</sup> He defends 'natural' slavery, in accordance with a theory of what may be called natural inequality, but is by no means unimpressed by the considerations on the other side,<sup>5</sup> which, indeed, more than once he can escape only by somewhat specious reasoning.<sup>6</sup> The slavery he defends is so greatly attenuated by reformatory doctrine that it really ceases to be the slavery of actual practice; indeed, as his learned expositor, W. L. Newman, observes,<sup>7</sup> Aristotle 'deserves to be remembered rather as the author of a suggestion for the reformation of slavery than as the defender of the institu-

<sup>1</sup> *Legg.* vi. 776 D.

<sup>2</sup> Indeed, counsels of perfection; *ibid.* 777 D: ἡ δὲ τροφή τῶν τοιούτων μήτε τῶν ὑβρίων ὑβρίζειν εἰς τοὺς οἰκέτας, ἥττον δέ, εἰ δυνατόν, ἀδικεῖν ἢ τοὺς ἐξ ἴσου. But he had no false sentiment about 'keeping the servant in his proper place', or meting out due punishment: *ibid.*, E, *ad fin.* The only repellent feature he seems to have found in slavery was the enslavement of *Greeks*, which deeply offended his nationalism: *Legg.*, *loc. cit.*, and cf. *Rep.* v. 469 B & C, and *Arist. Pol.*, i. 6, 1255 a 6 ff.

<sup>3</sup> Newman, *The Politics of Aristotle*, i. 139 ff.

<sup>4</sup> i. 3, 1253 b ff.

<sup>5</sup> i. 6, 1255 a 1.

<sup>6</sup> e.g. i. 6, 1255 b 10: The abuse of authority over the slave is wrong because, the slave being part of his master, injury of the part is injury of the whole!—No general principles of humanitarianism emerge from the discussion.

<sup>7</sup> *Loc. cit.* 151.

tion. The slavery he defends is an ideal slavery which can exist only where the master is intellectually and morally as high as the slave is low . . . His theory of slavery implies, if followed out to its results, the illegitimacy of the relation of master and slave in a large proportion of the cases in which it existed.

In Roman theory, greatly influenced by philosophical and especially Stoic speculations as to the Law of Nature, Aristotle's theory of natural inequality is exactly reversed, and slavery is frankly admitted to be 'contra naturam',<sup>1</sup> whereas liberty is a 'naturalis facultas eius quod cuique facere libet'.<sup>2</sup> As is well known, slavery was the chief example cited in support of Ulpian's (dubious) distinction between the *ius naturale* and the *ius gentium*.<sup>3</sup> Though Christianity tolerated slavery,<sup>4</sup> enlightened opinion, if it did not actually condemn it, had always cast the gravest doubts upon its justification,<sup>5</sup> and the whole tendency of the later Roman Law was strongly *in favorem libertatis*.<sup>6</sup> Why, then, was it so long tolerated, whether in its unmitigated form, or in the modified status of serfdom? Why were the final and decisive attacks upon it delayed until the eighteenth century A. D.? The mere fact that barbarous customs of war made it part of the *ius gentium* was hardly enough to endue it with such obstinate vitality; and to suppose that it was based upon a conviction resident in the mass of humanity—many of whom were, according to Aristotelian principles, 'natural slaves'—would be fanciful.

<sup>1</sup> Inst. I. 3. 2, quoting Florentinus *apud* D. I. 5. 4. 1; cf. Tryphoninus, D. 12. 6. 64.

<sup>2</sup> Inst. I. 3. 1, again quoting Florentinus, D. I. 5. 4. pr.; cf. Ulpian, D. I. 1. 4 and 50. 17. 32.

<sup>3</sup> D. I. 1. 4. Ulpian, Florentinus, and Tryphoninus are the only jurists who support the distinction, and they seem to have developed no very clear doctrine: see Carlyle, *Mediaeval Political Theory in the West*, I. 39 ff.

<sup>4</sup> St. Paul, I Cor. vii. 20-3; Col. iii. 22-5.

<sup>5</sup> Newman, *op. cit.* 155 ff.

<sup>6</sup> Buckland, *The Roman Law of Slavery*.

The truth is that slavery was a custom based upon the needs not of a popular majority but of a ruling minority. Ideally, that minority might consist of the mental and moral aristocrats of Plato and Aristotle; actually, it consisted of the 'property-owning classes', and it was they who kept it so long in existence, for economic reasons, which were characteristic of the ancient world, and which need no discussion. The same process will be found repeatedly in history—customs establish themselves not because they correspond with any conscious, widespread necessity, but because they fit the economic convenience of the most powerful caste.) The weaker members who form the majority of society accept these customs either because they are imposed by irresistible force, or because they suit on the whole the general arrangements of society, which those in subordinate positions are ready to accept or at least unable to reject.) This is very apparent in perhaps the most important body of custom which has ever existed in Europe—feudal custom. It is impossible to think of feudal custom as merely 'broad-based upon a people's will'. The bulk of it was founded upon the notion of *service*, not simply convenience or conviction. Service, or *rent*, was not, it is true, an obligation confined to any one class; the powerful baron, as a customer of the king, had his duties of service like anybody else. But the great bulk of services and rents were of a rural and agricultural kind, and they were undoubtedly imposed on the hewers of wood and drawers of water for the benefit of their superiors.<sup>1</sup> We must not on this account conclude that the feudal system was one of bare tyranny of the strong over the weak; but neither is it to be supposed that this elaborate customary system, which has so deeply affected all our institutions, took its origin solely from a popular *Bewusstsein*.

Many customs, again, are so essentially local in

<sup>1</sup> Vinogradoff, *English Society in the Eleventh Century*, 383.

origin that they cannot be said to arise from any widespread conviction.<sup>1</sup> The vigour and rapidity with which these local usages reproduce themselves is one of the most remarkable features of custom, and will call for separate consideration.<sup>2</sup> Neither England nor any other European country can claim that the merchant customs which have established themselves in its law are the product of any particular national genius. (It was overlooked by the Historical School that what we now understand by nationalism is a comparatively modern conception.) In the Middle Ages—indeed, probably as late as the seventeenth century—the boundaries which divided European peoples were far more those of religion than of race. The internationalism which is nowadays held up to us as an ideal of the future will be, if it ever comes, a less novel state of European society than its advocates represent. The *ius gentium* has been a real and powerful influence in civilization, and not a mere abstract aspiration. In the cosmopolitanism of commercial and many other customs, the *Volksgeist* loses much of its meaning. And the pretended purity of its lineage is often highly suspect. What allowance is made for the importation of custom by conquest, invasion, and ‘peaceful penetration’? Law is seldom of pure-blooded stock, and ‘national’ is a dangerous word to use of almost any legal institution.<sup>3</sup> ]

<sup>1</sup> Ehrlich, *Grundlegung der Soziologie des Rechts*, 368.

<sup>2</sup> *Post*, pp. 65 ff.

<sup>3</sup> Self-flattery in this respect is not unknown in our Common Law. Doubtless it gave Fortescue a patriotic glow, after describing the early conquests and invasions of Britain, to declare roundly that ‘in all the times of these several nations and their kings, this realm was still ruled with the self-same customs, that it is now governed withal’ (*De Laud.*, ch. 17). With no less unction did Popham C.J. state gravely in Court, ‘that the laws of England had continued as a rock without alteration in all the varieties of people that had possessed this land, namely, the Romans, Britons, Danes, Saxons, Norman, and English’; and Coke applauds this gratifying sentiment (cited Spence, *Equitable Jurisdiction*, i. 125). But a very slight acquaintance with legal history informs



3. *Development of Custom.*

Inner and outer manifestations.

When we speak of 'conviction' or 'spirit'—the nearest, though inadequate, approach we can make to the German terminology—we think of something intangible, psychological, non-material. But are we not making a large assumption in positing any conscious 'conviction' in those societies and at those times when custom most naturally comes into being? Custom is conduct. No conduct of any intelligent human being, or group of intelligent human beings, can be wholly will-less or reasonless. It has its internal and external aspects: the internal in mind and emotions, the external in conduct or, if we wish to avoid qualitative terms, in mere contractions of the muscles, 'irritability' or 'response to stimulus'. (When we are dealing with a state of society in which reflection about social institutions is *ex hypothesi* embryonic, it is not easy to distinguish between the *inner* manifestations of social tendencies—feelings, desires, will, consciousness—and their *outer* manifestations in mere conduct. To probe only the psychological genesis of social custom must lead to much inconclusive speculation; to see in custom nothing but *de facto* conduct will be to ignore the basis of will and desire which, in some degree, must underlie the conduct of all rational creatures. The German historical jurists have tended to concentrate attention on the inner or metaphysical aspect. Puchta, for example, is concerned with it almost exclusively: to him the *practice* of custom—custom as actual conduct in society, and therefore operative law—is merely the inseparable companion of customary law, a kind of necessary sub-product; but the real substance of the law itself is to be found in the immanent *Rechtsüberzeugung*. This attitude leads to abstractions which convey the less meaning the more we seek to analyse them; for when we are dealing with law, a concrete institution of human society, we cannot be content us that this is rhetoric addressed to the heart rather than to the reason. Even the idealism of Blackstone could not go so far: see 1 *Comm.* 64.

with mere abstractions.) We hear, for example, much of a *Volkswille*; but what meaning are we to attach to this supposed corporate will of societies in which the notion of corporate existence is rudimentary and inarticulate? It means even less than the *volonté générale* of the much more highly organized society of Rousseau. It means, indeed, nothing, except perhaps in the single instance of tribal self-defence or aggression; and it has long since been abandoned even by the modern disciples of Puchta and Savigny. They insist, and with reason, that the early popular 'conviction' about law, if it is anything, is a state of consciousness, not an act of will.<sup>1</sup>

The conviction or consciousness of the people has, in more recent jurisprudence, been associated with the conception of the people as a corporation. Behind all Teutonic theory of the nineteenth century lies the idea of the corporate life and thought of the people, and above all of the German people. But to Savigny and Puchta this corporate *Geist* remains in the shadowy world of the spirit. It was reserved for a later German jurist, scarcely less distinguished, to clothe the corporate spirit with flesh and blood. To von Gierke every true human association becomes a real and living entity animated by its own individual soul; of all such leagues, State-organized nations are the greatest, and the corporate spirit, the People-spirit, is the very core of the separate personality which each possesses. Corporate life of society.

'The development of law lies in human action. But the subject of this action is not individuals, but communities (*Gemeinschaften*). The individual man who co-operates in the process always acts as a component *member* and in furtherance of a human *community*.'<sup>2</sup>

This does not necessarily mean the stunting or suppression of individuality: the relationship is one of

<sup>1</sup> Gierke, *DPR*. i. 163 ff.

<sup>2</sup> *Ibid.* i. 125.

mutual benefit; in proportion as the individual labours in the interest of the community, so he adds to his own strength and stature. But always the community, at least in the jurist's view of history, is the highest achievement of human endeavour. Gierke approached his subject in the same historical spirit as Savigny, and like Savigny, made it a lifework; like Savigny, again, he exalted and cherished the spirit of his nation; but with him that spirit is no longer a mystic attribute irreducible to exact cognizance, but the essence and distinguishing mark of a real *person*. ✓

'Conviction' or  
'practice',  
as generating  
custom? Rational  
and irrational  
customs.

Whether this personality be 'real' or 'fictitious', whether the doctrine does not merely attach attributes of the phenomenal to what nevertheless strictly belongs to the world of the noumenal, is still a controversy on which we need not enter. ✓ But let us note that in Gierke's conception of the 'corporate life of the people' the development of law is to be found in the 'outer manifestation' of conduct rather than in the 'inner manifestation' of conviction. } ('The development of law', to repeat his words, 'lies in human *action*.') } In the infancy of a people it is the thing *done* or *made*, the thing grasped by the senses rather than by the intellect, which prevails. ✓ The aspirations of the people will express themselves in the concrete forms of plastic arts, not in abstractions, for the popular mind is as yet incapable of abstractions. Ingenuity and imagination are expended on creating *emblems* which embody a meaning not explicitly understood. ✓ Law streams from the soul of a people like national poetry, it is as holy as the national religion, it grows and spreads like language; religious, ethical, and poetical elements all contribute to its vital force. But the shapes in which it presents itself are physical, tangible, and immediate, full of fantasy and force, but weak and unavailing when any abstraction enters in or any general idea becomes disengaged from discrete phenomena. } It is an error to apply more sophisticated ideas of consciousness to

this naïve state of mind. (In this stage of social development, what we should call general ideas, presented themselves to men's minds not as mental pictures but as states of fact.) When men spoke of peace, they thought of the *fact* of peace and the material circumstances which it involved: breach of the peace meant to them the *act* of lawless violence; vindication of the peace meant the actual prosecution of revenge, either by self and kindred, or by appointed Judges; loss of peace—outlawry—meant the miserable condition of exclusion from the guarantees of life and limb, punishment meant the actual infliction of a natural retribution. Power over persons was the power of the strong hand, property was the investment of individuals with material goods, to have and to hold. Procedure was not a rationalized system, but was shaped into immutable forms and sacramental words; rights and duties are not debated in the abstract, but the very persons and things themselves in dispute must be 'actually and bodily present'—the rod or spear of ownership, the clod of earth from the debatable land, the debtor in default, the slave claimed free: these are not mere empty symbols, but convenient devices to make the invisible visible and the intangible tangible. Institutions are always expressed in terms of the concrete and the formalistic, they never attempt to express a conception of the universal. (The idea of any immanent general system in law is wholly lacking. It is only when a nation is well advanced in its development that the force of the abstract begins to assert itself and symbols cease to satisfy the mind. The world of thought prevails over the world of facts. The physical and the sensuous become ancillary to the intellectual: everything urges from 'separateness' to 'togetherness', general principles of rule, harmony, and co-ordination establish themselves. The corporate life of a young society is full of vital creative force; from it grow religion and poetry, law and custom, as the

branches from a tree, but the forms it creates are not *conscious* social institutions. These come only with the full maturity of the people; if they are lost and there is retrogression to 'separateness' in ideas and habits, this is the stage of decay and disintegration, and ruin is not far distant.<sup>1</sup> )

✓ We must not, then, in searching for the *conviction* in the corporate life of a people, underestimate the effect of the actual *practice* of custom. These two elements are not mutually exclusive, but interdependent and complementary. (In the earliest stages of society, practice plays the greater part and custom grows by the force of concrete example; but as general notions begin to be apprehended in the abstract, conviction and practice become the necessary counterparts of each other and settle into a perpetual process of action and reaction.) To this extent a 'conviction' of some kind, in some degree, must lie behind all customs, that they would never arise at all unless some motive for them existed in reason or convenience. ✓ Often, it is true, the rational basis is extremely obscure—a custom may seem entirely arbitrary, a mere freak or throwback. But this is usually because we have insufficient evidence of its origin; further investigation, or a chance discovery, may show that there is an excellent practical reason for what seemed at first sight entirely irrational. It is puzzling, for example, to find a single locality like Kent or Nottingham adopting rules of inheritance directly at variance with a well-established 'custom of

<sup>1</sup> *Genossenschaftsrecht*, ii. 7 ff. It must be confessed that Gierke's eloquent, sometimes almost rhapsodical, description of early society seems to contain no small element of imagination, and is somewhat reminiscent of those bright-hued pictures of a Golden Age which were once so popular. It is not, I hope, an excess of scepticism to regard with some distrust all generalizations about the state of mind of primitive man. The evidence is less than the imaginative stimulus. But so far as the evidence goes, it seems to justify Gierke's main point—that the elements of law and custom first present themselves in forms separate and concrete, not general and abstract.

the realm 'like primogeniture; but research has shown very sufficient reasons for the apparent arbitrariness of gavelkind and Borough English custom.<sup>1</sup> It is true, as against Savigny, that the reason and utility on which such customs rest often arise from purely local conditions, not from any widespread *Geist*; still, they are based on distinguishable motives, and the further we trace the custom back, the clearer the motives become. We must be cautious of characterizing any custom, however seemingly abnormal, as irrational unless we have all the evidence before us.

(But we cannot ignore the converse process, that of practice generating conviction. There are many customs which cannot be attributed to any conscious conviction without metaphysical ingenuity which savours of pure invention. In the experience both of communities and of individuals, circumstances often arise in which it is necessary to choose between several equally desirable or undesirable alternatives. A traveller comes to a parting of the ways, and knows not which of several roads leads to his destination; on what discernible principle does he select one or the other?) When it is a question of taking one from among a number of articles equal in appearance and value—fruit, pens, pins, pound notes, cards, pieces of paper, what you will—on what principle of conviction or motive is the selection made? It is extremely difficult, if it be possible at all, to find the rational basis of such acts of choice. It is not denied that logically and psychologically *any* act of choice necessarily involves a preference, a contrast and selection, between a definite better and a definite worse; but the determining elements in the process of preference are too recondite for analysis.) The small acts of daily life are full of such apparently arbitrary choices, which are not made the more explicable by the general description 'habit'.

<sup>1</sup> Vinogradoff, *Villainage in England*, 185, 205 ff.; P. & M. i. 165; Holdsworth, *H. E. L.* iii. 256 ff.; Spence, *Equitable Jurisdiction*, i. 4.

So it is also in the growth of many customs. What is there of 'conviction' in adopting the left or the right as the rule of the road? The custom varies indefinitely in different countries, and even, on the Continent, in different parts of the same country. And this is legal, not merely social, custom; for to choose the wrong side of the road may involve the most painful consequences in law.<sup>1</sup> Why do Westerns write from left to right, and many Easterns from right to left? Innumerable local customs are associated with particular days of the year: why one date more than another? 'A custom', says Blackstone,<sup>2</sup> 'in a parish that no man shall put his beasts into the common till the 3rd of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after.' A great many commercial customs appear to be quite arbitrary; publishers and bakers defy the laws of mathematics by making 12 equal 13, and rabbit-merchants, it would seem, consider 1,000 synonymous with 1,200.<sup>3</sup> A little industry could collect together a large number of these seemingly erratic anomalies among the customs of localities and merchants.<sup>4</sup> Does any fundamental *Bewusstsein* underlie them? We must remind ourselves again that they are not always as irrational as they seem. Thus, to take Blackstone's example, there is a reason why the common pasture should not be available until October, for it is not till that month that the crops will have been removed. Similarly, '12 copies (or loaves) to be reckoned as 13' is merely a child-like device for allowing discount or reducing the price of a dozen. But, as Blackstone asks, why the 3rd of October rather than the 2nd or the 4th? Why 13 rather than 14 or 15? Customs may be all in a greater or less degree rational in their inception, but

<sup>1</sup> See Christian's interesting note to 1 Bl. Comm. 74.

<sup>2</sup> 1 Comm. 77.

<sup>3</sup> *Smith v. Wilson* (1832), 3 B. & A. 728.

<sup>4</sup> See note to *Wigglesworth v. Dallison*, 1 Sm. L.C. (11th ed.), 545.

it often happens that *once they have been inaugurated*, elements of the non-rational enter in, and having once entered, abide. A point has to be fixed, a line to be drawn, somewhere. Often, as has been said, it is possible to find unsuspected explanations; but one cannot always resist a suspicion that the explanations suffer from the dubious plausibility of the 'aetiological'. Thus it is sometimes suggested—though I do not know that it has ever been pressed as a serious theory—that in England the left is chosen as the rule of the road in order to leave the right side clear and the right hand free for self-defence. A Frenchman, then, prefers to defend himself with his strong left arm? <sup>1</sup> Such explanations, which are also not unknown to philologists, invite scepticism. More truly says the Digest,<sup>2</sup> in its blunt fashion: 'Non omnibus quae a maioribus constituta sunt ratio reddi potest.'<sup>3</sup>

But why, when the point has once been taken, or the line has once been drawn, does it become fixed? Why does the thing *done* become the thing which *is to be done*? In the answer to this question, the part played by sheer imitation has, as I venture to think, been greatly neglected. It is practically ignored by the German historical jurists, and until quite recently no attempt has been made to evaluate it. Yet imitation is one of the commonest and most influential elements

Imitation.

<sup>1</sup> M. Tarde (*Les Lois de l'Imitation*, 349) offers an interesting explanation of the custom of writing from left to right. The copy of this work which has been available to me once belonged to the late Professor A. V. Dicey. In the margin of this page I observe an emphatic query, which emboldens me to venture the opinion that M. Tarde's reasoning is more ingenious than convincing.

<sup>2</sup> I. 3. 20.

<sup>3</sup> 'It cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage': per Trevor C.J., *Arthur v. Bokenham* (1708), 11 Mod. 160. Cf. Coke C.J. in *Hix v. Gardiner* (1614), 2 Bulstr. 196.



in the life of every individual and every society. To say that we are all creatures of habit is to blush for a platitude; yet platitudes are often truths which are accepted more unquestioningly than they are apprehended clearly. If we dispassionately examine our ordinary conduct, we shall find that far more of our daily actions are purely imitative, and far fewer purely rational, than it pleases us to admit. To make each separate act a thing of deliberate reason requires more time, more independence of judgement, and more hardihood than ordinary human life allows or ordinary human nature achieves. 'The most intellectual of men', writes Walter Bagehot,<sup>1</sup>

'are moved quite as much by circumstances which they are used to as by their own will. The active voluntary part of a man is very small, and if it were not economized by a sleepy kind of habit, its results would be null. We could not do every day out of our own heads all we have to do. We should accomplish nothing, for all our energies would be frittered away in minor attempts at petty improvements. One man, too, would go off from the known track in one direction, and one in another; so that when a crisis came requiring massed combination, no two men would be near enough to act together. It is the dull traditional habit of mankind that guides most men's actions, and is the steady frame in which each new artist must set the picture that he paints. And all this traditional part of human nature is, *ex vi termini*, most easily impressed and acted on by that which is handed down.'

It is not mere weakness or indolence that constrains us to submit in a reasonable degree to the dictates of fashion. It is easy to sneer at the conventionally-minded, and it is true enough that the blind adherence to what is usual, against all other considerations whatever, is the chief enemy of progress and the deadliest paralysis of the intelligence. But where no great principle is involved, adherence to the usual is the merest prudence. To be singular in the ordinary matters of

<sup>1</sup> *The English Constitution*, ch. i.

use and wont is worth neither the effort nor the discomfort. Not to be singular—to follow the prescribed mode—is at least a guarantee of security. It is based upon the reasonable expectation without which social relationships become anarchical. What has been done once and has produced a certain result will, if done again in the same way, produce the same result. The trite way is not only the safe way, but it is generally also the short way. And so, from following the trite way ourselves, we easily come to believe that for others to deviate from it is not only foolish but anti-social. This belief is for the most part founded not on any conviction of ultimate rightness or wrongness, but simply on our tenacity to imitative habits.

The only scientific attempt which has been made, so far as the present writer is aware, to examine the workings of the imitative faculty in man and society is G. Tarde's profound and fascinating study, *Les Lois de l'Imitation*.<sup>1</sup> To M. Tarde-imitation is no mere curiosity of psychology, it is one of the primary laws of nature. Nature perpetuates itself by repetition: and the three fundamental forms of repetition are rhythm or vibrations ('ondulation'), generation, and imitation. With the biological aspects of these principles we cannot be here concerned, nor are they M. Tarde's main inquiry; suffice it that there is ample evidence to support them in post-Darwinian natural science. Applying them to the evolution of human societies, we see imitation as one of the necessary inherent principles by which society perpetuates itself. It is no mere casual phenomenon, recurring with unaccountable frequency: it is a wholly indispensable quality in the continuity of a society—if society is to have any continuity, or, in other words, life. 'La société, c'est l'imitation.' Nowhere is

M. Tarde's  
thesis.

<sup>1</sup> The subject of legal custom is also extensively dealt with in the same writer's *Transformations du Droit*. A suggestive, but ill-developed, view of will and imitation, based on Bain's theory of the will, is to be found in Korkunov, *Theory of Law*, § 20.

the force of imitation more marked than in the strength and conservatism of custom and law. 'Le droit . . . n'est ici qu'une suite et une forme du penchant de l'homme à l'imitation. . . . La solidarité juridique a un caractère exclusivement social, mais pourquoi? Parce qu'elle suppose la similitude par imitation.' A social group is defined as 'une collection d'êtres en tant qu'ils sont en train de s'imiter entre eux ou en tant que, sans s'imiter actuellement, ils se ressemblent et que leurs traits communs sont des copies anciennes d'un même modèle'. { Custom is the great conservative factor in society exactly because, by its imitative influence, it is for ever striving to maintain the 'copies of the same model'. It is to the life of society what reproductive repetition is to the order of nature. } But the nineteenth century has acquainted us with another constant principle in the order of nature—that of 'variation'. The variations of custom may be said to be prevailing *fashions*. Custom is the thing of immemorial antiquity, fashion is the thing of the moment. We have only to look round us to see how imperious it is in its demands and its effects, and how indefinitely it varies and fluctuates, comes and goes. If in the mysterious realm of mass-psychology we are searching for an unmistakable, ever-present, and inexhaustible *Geist* or 'corporate spirit', surely there is none more manifest, none which more frequently forces itself on the attention, than this instinct of imitation which permeates every department of social life like the very atmosphere which it breathes. The sceptic may reject, for want of proof—or perhaps for lack of faith—the nebulous abstractions of the *Völkergeist* or of the corporate personality of the people. But while he may well shrink from attempting to analyse the psychological qualities of the imitative faculty, he can scarcely deny its vigorous existence and its manifold results.

✓M. Tarde insists that many of the influences which contribute to the force of imitation are 'extra-logical'.

Partaking of the nature of the fundamental impulse to repetition and reproduction, they are concerned not so much with reason as with feeling and instinct. Indeed, he insists almost too strongly upon this aspect of the matter, for he seems to leave insufficient room for that kind of imitation which is deliberate and logically reasoned—a form of imitation which has undoubtedly played its part in the propagation of custom. Yet in a great variety of cases within common experience the impulse to imitation does not seem to be rational at all. It seems to exercise some kind of hypnotic influence, or shall we say a force of attraction, which is no more distinguishably the product of reason and choice than polar attraction is the product of the needle and the magnet. M. Tarde calls it ‘magnetization’ or ‘sombambulism’. It is for the psychologist to explain, if he can, this curious effect of imitation on the minds not only of men but of large groups of men; that is hardly the task of a lawyer. We certainly do not explain the matter by using such terms as ‘automatic’ or ‘sub-conscious’. But however baffling this phenomenon may be, few will deny that it exists. Everybody is familiar with popular ‘crazes’. These are quite different from mere passing fashions. As has been said, there is generally a very simple reason for ‘following the fashion’: it is less trouble to do so than not to do so. But there seems to be no reason why ‘crazes’ should suddenly appear and disappear. A whole community will suddenly, for no apparent reason, throw itself passionately into the pursuit of a particular game or pastime or competition. The extraordinary infection of these trivialities is something quite outside logic and reason; and it is, needless to say, a trifle in comparison with the infection of inventions, ideas, creed, language, morals, art, and institutions. In a curious pamphlet called ‘Shakespeare and the Drama’,<sup>1</sup> Tolstoy calls attention to ‘those epidemic “suggestions”

Suggestive  
influence  
of imita-  
tion.

<sup>1</sup> *Tolstoy on Shakespeare*, Everett & Co., 6d., undated.

to which men ever have been and are subject. Such "suggestion", he continues, 'always has existed and does exist in the most varied spheres of life'. As glaring instances, considerable in scope and in deceitful influence, one may cite the medieval Crusades, which afflicted not only adults but even children, and other "suggestions" startling in their senselessness, such as faith in witches,<sup>1</sup> in the utility of torture for the discovery of truth, the search for the elixir of life, the philosopher's stone, or the passion for tulips, valued at several thousands of guldens a bulb, which took hold of Holland. Such irrational "suggestions" always have existed and do exist in all spheres of human life—

<sup>1</sup> The extraordinary influence on medieval Europe of the belief in witchcraft has been described by Lecky, *Rise of Rationalism*, vol. i, ch. i. It was less powerful in England than on the Continent; but even in England there was something approaching a 'witch-scare' in the late sixteenth and early seventeenth centuries. Bishop Jewel's jeremiads on the subject inspired Elizabeth with such genuine alarm that she appointed a special commission which conducted a savage campaign against witches. In 1582, seventeen women of the village of St. Osyth, in Essex, were barbarously executed. The superstition was greatly stimulated by James I's peculiar interest in it, as evidenced by his 'Daemonologie', and trials were frequent throughout the seventeenth century. The trial of the witches at Bury St. Edmunds in 1664, before Sir Matthew Hale, is recorded in 6 St. T. 647. The 'scare' died down towards the end of the seventeenth century. Holt C.J. did much to discourage it (see Holdsworth, *H. E. L.* vi. 518), especially by the trial of Hathaway in 1702 as a cheat and impostor in that he falsely pretended to be bewitched (14 St. T. 643). The last conviction for witchcraft in England seems to have been that of Jane Wenham at Hertford in 1712. The numerous statutes relating to witchcraft, dating from before the Conquest, were not repealed till 1736 (9 Geo. III, c. 5). Much curious learning on the subject is to be found in Reginald Scott's *Discoverie of Witchcraft* (1584) and in the evidence at the trial of the Bury St. Edmunds witches, above-mentioned. See also Stephen, *Hist. Crim. Law*, ii. 430 ff. Belief in witchcraft is by no means extinct even now in some rural districts, especially in certain remote parts of Wales. Only a few years ago a woman was tried at the Cardiff Assizes for having obtained some hundreds of pounds from a farmer by professing to supply him with charms: see Mr. A. G. Bradley's *Exmoor Memories*, 148.

religious, philosophical, political, economical, scientific, artistic, and, in general, literary—and people clearly see their insanity only when they free themselves from them.} But so long as they are under their influence, the suggestions appear to them so certain, so true, that to argue about them is regarded as neither necessary nor possible.} Tolstoy's main theme is startling—it is that Shakespeare is a writer totally devoid of merit, artistic or moral, and that the high esteem in which he is held is merely another example of popular hypnotic suggestion, intensified by the modern power of the press! We can hardly share Tolstoy's astonishment that he could find none to agree with him in this highly original view; but his other examples are striking and notorious. M. Tarde takes as a modern example of an imitative 'craze' the strange and unpleasant habit of chewing gum, which has spread so widely in the United States. The habit of snuff-taking, so prevalent in the eighteenth century, also suggests itself; and the almost complete disappearance of that habit gives rise to melancholy doubts whether the practice of smoking may not some day disappear from male, and even female, society.

We must certainly reckon with this force of attraction—I will avoid the term 'hypnotism'—in the propagation of custom. Not infrequently it spreads like a 'craze': and this is true not only of isolated usages but of whole codes of laws. In France and Germany, in the twelfth and thirteenth centuries, there was a continual process of legal imitation between many towns previously governed by quite distinct customs. The customs of Lorris, for instance, spread with great rapidity in France. In Germany nearly all the municipal laws of the Rhine towns were derived from Cologne; while Lubeck served in the same way as a model for the Baltic towns. The famous Law of Magdeburg was not only extensively copied in Germany, but spread into Siberia, Bohemia, Poland, and

Examples  
of  
imitative  
customs:  
borough  
customs.

Moravia—indeed, its influence can be traced throughout practically the whole of Eastern Europe. Penal law is full of similar examples of imitation. Until the eighteenth century, torture as a means of legal proof bespatters all Europe with blood.<sup>1</sup> Some are inclined to think that the extraordinary popularity of the jury since the eighteenth century—a popularity maintained despite glaring defects and anomalies—is only another example of an epidemic superstition.<sup>2</sup>

In our own medieval law we have a remarkable example of the force of imitation in the development of local and national civic institutions. The borough, with its Court, its peculiar privileges and duties, and usually its gild merchant, possessed from the earliest times a notable individuality and a high significance in national life.<sup>3</sup> Its importance was augmented by the sanction of the numerous royal charters which were granted throughout the twelfth and thirteenth centuries, and which became one of the chief distinguishing marks of the borough. The process of imitation and adoption which we have just observed at work in France and Germany is also to be found in the 'affiliation' of medieval boroughs in England.

'When a prosperous village or a newly-founded town wished to secure the franchises of a free borough, or when a borough sought an extension of its liberties, it was natural for the community to look for a model among its more privileged and flourishing neighbours.'<sup>4</sup>

In this way, a number of 'parent' boroughs are widely imitated, and customs originally peculiar to one locality—often customs deeply affecting the citizen's rights of person and property<sup>5</sup>—become widespread throughout the land. Thus, to take one or two of the examples

<sup>1</sup> It was never legal in England by the Common Law, but was frequently admitted by exercise of the royal prerogative: see Holdsworth, *H. E. L.* v. 170 ff. and 185 ff.

<sup>2</sup> Tarde, *op. cit.*

<sup>3</sup> *Ante*, p. 31, n. 2.

<sup>4</sup> Gross, *The Gild Merchant*, i. 242.

<sup>5</sup> They are fully described in P. & M. i. 634 ff.

collected by the industry of Dr. Gross,<sup>1</sup> the code of London is imitated in forty-nine English towns, that of Winchester in twenty-four; Oxford, York, Hastings, Dublin, Kilkenny, Rhuddlan, and Newcastle serve as 'parent' boroughs to many more.

But the process does not end here. If we look at Dr. Gross's tables, we find that Bristol and Hereford are imitated by a great number of towns in England, Ireland, and Wales. Later researches have shown that in this instance a strong foreign influence has entered in, and that a great many of the customs which were attributed to Bristol are in fact derived from the Norman town of Breteuil.<sup>2</sup> The laws of Breteuil themselves seem to have been derived from Verneuil, John having granted it the liberties of that town in 1189. With great rapidity during the twelfth and thirteenth centuries, Breteuil, a strong but by no means pre-eminent community of France, played the same part in England as Lorris in France or Freiburg and Magdeburg in Germany.<sup>3</sup>

This example of imitation is characteristic. The process was not purely mechanical. The laws of Breteuil were in some respects peculiarly favourable to the burgess,<sup>4</sup> and for that reason were naturally popular. There is a more personal reason. In 1060 William of Normandy had given the charge of the new Castle of Breteuil to William Fitzosbern,<sup>5</sup> who after the Conquest became Earl of Hereford and of the Isle of Wight. William Fitzosbern doubtless introduced the customs he knew best into Hereford; and their extension would in some measure be due to the fact that he was commissioned by the king to build castles and

<sup>1</sup> *Op. cit.* i. 254 ff.

<sup>2</sup> Miss Mary Bateson, 'The Laws of Breteuil', *E. H. R.* xv and xvi; Petit-Dutaillis, *Studies Supplementary to Stubbs's Constitutional History* (2nd ed.), 88 ff.

<sup>3</sup> Petit-Dutaillis, *loc. cit.*

<sup>4</sup> Petit-Dutaillis, *loc. cit.* 89; Miss Bateson, *E. H. R.* xvi. 342.

<sup>5</sup> Stubbs, i. 389; P. & M. ii. 267.



was given, practically *carte blanche* in the creation of boroughs.<sup>1</sup> In the case of other 'parent' boroughs, 'the need', as Dr. Gross observes,<sup>2</sup> 'of a reliable precedent . . . was especially felt in an age when even the magistrates of most towns were unskilled in law, and when the king and baron were ever ready to nullify chartered rights, the one by a quibbling "quo warranto", the other by evasions and encroachments'. But these considerations do not entirely account for the extent of borough-affiliation. As in most cases of imitation which is not merely simian, there is, in the first instance, a rational ground for the impulse to imitate; but *once the process is begun*, it goes far beyond the stimuli of expediency and utility alone, and gathers momentum of its own motion. And thus it comes about repeatedly in history that the greatest results may ensue from the most unsuspected causes—as certainly happened in the case of these English borough customs and the part they played in the development of the Common Law. How significant that part was has not even yet been fully investigated.

So far we have considered custom as a legal and social phenomenon growing up by forces inherent in society—forces partly of reason and necessity, and partly of suggestion and imitation. But there is another view which would regard custom as of a far more artificial origin than this. The consideration of that view must be reserved for another chapter.

<sup>1</sup> Miss Bateson, *E. H. R.* xvi. 335.

<sup>2</sup> *Op. cit.* i. 242.

## II

### CUSTOM: INTERPRETATION AND APPLICATION

#### I. INTERPRETATION OF CUSTOM

WHEN a society possesses accredited lawgivers or tribunals, it is part of their function to supervise the operation of custom. Since custom contemplates legal relationships, it must pass under review by the constituted judicial authorities which control all legal relationships. In the ordinary terminology of jurisprudence, the interpreters of custom are generically described as *jurists*, their science, to adopt a convenient German term, as *Juristenrecht*. It need hardly be observed that this expression is not confined to 'jurists' understood as learned writers upon legal topics; it includes all those whose special function is to expound and apply customary law. Thus in ancient societies it will comprise the semi-fabulous code-makers and lawgivers; and in England, though not to the same extent on the Continent, it must also include the Judges themselves.

Juristic control of custom.

Two principal views have been advanced as to the relation between customary law and expert interpretation.

1. *View of the Historical School:*  
*Juristenrecht subordinate to Volksrecht.*

The first is represented by the Historical School of Savigny. Now here the apostles of national, evolutionary law were in a difficulty. They could not, as good historians, be unaware that the interpretation of specialists has always played an important part in the development of legal systems; and this influence had all the appearance of being highly creative. But to concede to individuals, as distinct from the *Volk*, a creative function of this kind was to drive a stake into the heart of the *Rechtsüberzeugung*. How, then,

account for the undeniably persistent phenomenon of the interpreter influencing and moulding custom? The answer must be given in Savigny's own words :<sup>1</sup>

✓ 'The law, originally the common property of the collective people, in consequence of the ramifying relations of actual life, is so developed in its details that it can no longer be comprehended by the people at large. A separate class of legal experts thereupon comes into existence, which, itself an element of the people, represents the community in this domain of thought. In the peculiar consciousness of this class, the law is only an extension of the characteristic development of the *Volksrecht*. This latter henceforth leads a double life. ✓ In its fundamentals it continues to exist in the common consciousness of the people; but the precise determination and application of details is the special task of the class of jurisconsults.'

✓ A more recent statement of the same view describes the magistrate or Judge as 'the recognized and permanent organ through which the mind of the people expresses itself in shaping that part of the law which the state power does not formally enact'.<sup>2</sup>

In this view, the legal interpreter is entitled to the name of jurist only in so far as he remains the *representative of the people*. It is inevitable that as law expands in scope and complexity, there must grow up a class of persons 'learned in the law' (*Rechtskundige*). To them recourse may be had in case of dispute, and they, not only in the arena of litigation, but in the study as well, will lucubrate the amassed wisdom of the law.

✎ These two functions—the elaboration of the pure theory of law, and its application to concrete cases—Savigny recognizes as distinct. But both are within the periphery of the same essential task—the exposition of the existing law derived from the characteristic customs of the community. It is not the interpreter's business to add anything of his own. He is a conduit-pipe, not a source. } True, an efficient conduit-pipe is

<sup>1</sup> *System*, i, § 14.

<sup>2</sup> Bryce, *Studies in History and Jurisprudence*, 690.

not made by any chance method out of any chance material; and it is only by assiduous training that the jurist can become a straight, sound, efficient conduit-pipe. But to attempt to be more than this is to attempt what is both undesirable and impossible: it is to usurp the office of the community, nay, of nature itself.

This theme is not a mere generalization in Savigny and Puchta. It is elaborated with the highest patience and in particular it is applied to the case which lay nearest to Savigny's heart—the influence of jurists on the development of medieval German law. The abundant apparent exceptions to the general rule, and the considerable difficulties in its way, are not shirked, though they are sometimes treated with a somewhat hesitating logic. But the cardinal doctrine remains constant. The entire legitimate function of the interpreter must be restrained within the central fact of the *Rechtsentwicklung*, or evolution of law.

Without having recourse to obscure factors in primitive societies, a plain man, regarding the matter as one of simple fact, will immediately feel grave objections to this theory. When a Judge grants a writ of Habeas Corpus, and takes occasion to say that the freedom of the individual from unlawful restraint is one of the most fundamental and ancient rules of English law, he may be said, in a sense, to be echoing a principle resident in the conviction of the entire British community. But when a Judge decides a disputed question of property according, let us say, to the Rule in Shelley's Case, in what real sense can he be said to be a representative of the people? Can it be pretended that a pious faith in the sanctity of seisin burns in the bosom of the Commonwealth, suffusing all its members with a healthy glow? Is the community plunged in gloom when an Act of Parliament incontinently sweeps the rule out of existence? The truth is that the Judge who has played a new variation on the Rule in Shelley's Case is operating in a sphere

Practical  
objections  
to this  
view.

as remote from 'popular consciousness' as a mathematician who has discovered a new law of Elliptical Functions. The present writer cannot go the whole distance with those who say that the Rule in Shelley's Case has been merely 'made' out-and-out by Judges; but its origin is certainly not to be found in mass-psychology. Yet it is no less the law of the land than Habeas Corpus, and may affect a citizen's rights no less. It is impossible to believe, in view of plain facts, that what is *in gremio iudicis* is necessarily *in gremio populi* or that the *vox iurisconsulti* is the *vox populi*.

For here, and always, the Judge is performing a function not merely subsidiary to the operation of law, but inherent in its very nature. Law exists in order to be applied; and it must be applied through some human agency. If all men apprehended rules in precisely the same manner; if all men were at one about their rights and duties; there would be no need for legal exposition, and indeed little need at all for 'law', as that term is usually understood. But since unanimity is impossible, there arises very early in the development of law the necessity for analysis and application through the medium of the skilled, impartial interpreter. The veriest tyro in legal study is soon made aware how omnipresent the influence of the interpreter has been. (It has not always been an influence for good; 'professionalism', both in ancient and in modern societies, has too often impeded progress and brought justice into disrepute. But in another and more characteristic aspect: in the devoted search after exactitude and the quest of justice for its own sake, the expert interpretation of the law has rendered incalculable service to mankind. The force and discipline of legal reasoning have not only been a constant attraction to commanding minds, but have made the lawyer a model of that dispassionate thinking, clear vision, and nice appreciation of evidence, without which it is impossible to progress far in the orderly conduct of mundane affairs.)

It is hardly necessary to dwell on the many examples in legal history of the potent effect which individual geniuses, or groups of geniuses, have had upon the development of law. The very word 'jurist' at once suggests that remarkable group of men who, during the first two centuries of the Roman Empire, built an imperishable legal monument. It would be a grave exaggeration to say that the classical jurists made Roman Law, either ancient or modern. It cannot even be said, Savigny notwithstanding, that Roman Law itself was entirely indigenous. Nevertheless, the work achieved by the classical jurists, and the vitality of their influence, are among the most remarkable proofs in history that the indestructibility of matter is as nothing to the indestructibility of mind. Let us remember that they were a class of hard-working practitioners or officials—not rulers or prophets or demigods, not legislators except in a derivative sense, and not aided by any of the glamour of myth or fable. Yet for two thousand years they have never lifted their hands from European legal institutions. More than once it seemed that their influence had been destroyed by adverse circumstances. In the third century A. D., when Ulpian's work was done and there began for Rome a long period of disruption and decadence, it might well have seemed that the labours of the great jurists had been thrown away. In the fourth and fifth centuries, Roman Law seems to have fallen into a state of desperate confusion, only slightly affected by successive attempts at codification on the part both of Romans and barbarians. He would have been a very bold prophet who could have predicted for the dead giants of the past the resurrection which they were to receive at the hands of Justinian. The world's greatest codification is compiled, in by far its greatest part, from the learning of jurists dead two, three, four, and five hundred years. But even this resurrection seemed to have been to no purpose. Darkness fell on the

Influence  
of jurists  
on  
develop-  
ment of  
law :  
examples.

learning of the jurists, as on all learning, for five hundred years. The flame of the classical tradition sank to a wan flicker with little promise of heat or light. Humble clerks just kept it alive with their encyclopaedias and glosses. And then, in Provence, in Lombardy, at Ravenna, and at Bologna, comes the second resurrection. Learning returns to the 'milk of the word', sterilized of the barbaric germs which have been infecting it for five centuries. Now, and for all time, the jurists' title to immortality is established. Not a single country in Europe has been unaffected by them, not even England, which was the least receptive of their influence. Our medieval law has a direct connexion with Bologna. Not only was Bracton largely indebted to Azo, but our 'English Justinian' visited the School of Bologna in 1273 on his return from the Holy Land, and took from it a legal adviser whom he entrusted with high offices of State. For seven years this Franciscus, son of Accursius, was to Edward I *familiaris noster, Juris Civilis professor*, and nearly to the time of his death was in receipt of a pension from his royal employer.<sup>1</sup> Who can estimate his influence on the opinions and decisions of our most famous lawyer-king?

Our own law is impregnated with the influence of great expositors. Bracton's debt to Bologna is now generally admitted; our own debt to Bracton is not only for a treatise on medieval law of capital importance, but in a large measure for the foundation of a system of precedents which, rightly or wrongly, has become an indispensable part of our system.<sup>2</sup> Littleton's task was no less than to make cosmos out of the chaos into which our land law had been gradually slipping for some 150 years. One trembles to conjecture what our law of real property might have become if this profound student had not grasped the principle that *lex plus laudatur quando ratione probatur*, and had not pene-

<sup>1</sup> Spence, *Equitable Jurisdiction*, i. 131.

<sup>2</sup> *Post*, p. 124.

by all the comparative evidence of known legal systems, and proceeds to examine that evidence with abundant patience and erudition. As an example of a contemporary society living under customary law, he takes England with her Common Law, and emphasizes the influence of judicial precedent in 'general' custom and of judicial tests in 'particular' custom. He examines in turn Greek, Irish, and Indian law (following Maine), Hebraic, Mussulman, French, and Germanic, and gives special attention to custom in Roman Law, particularly the Twelve Tables and the *Juristenrecht* of the classical jurists. We must not follow him into all these researches, but we may state in his own words the general significance which he attaches to these many manifestations of the same influence. It will be seen that he ranges himself with Josef Kohler, whose copious work in comparative jurisprudence has been the foundation of much subsequent study.

'It is only by the protracted influence of arbitral or judicial decisions . . . that law becomes differentiated from ethics and morals; that it is crystallized in juridical rules (*normes*); that, slowly indeed . . . it prevails over the notion of State guarantee, the sanction of social constraint . . . Jurisprudence remains not only the natural instrument for the development of customary law, but also one of the chief instruments which effect a necessary harmony between the variations of the social and economic setting and those legal systems which have been the subject of codes.' Kohler . . . constantly returns to the principle that in every legal system, whether contemporary or in the historic past, a faithful examination of the theory of legal sources always reveals the presence, among the most productive agencies in law, of this essential element, *the creative force of jurisprudence*.<sup>1</sup>

Approaching the question with a sociological interest, E. Ehrlich. Professor Eugen Ehrlich<sup>2</sup> also lays great stress on the influence of the *Juristenrecht*. He devotes particular

<sup>1</sup> *Op. cit.* i. 216 ff.

<sup>2</sup> *Beiträge zur Theorie der Rechtsquellen; Grundlegung der Soziologie des Rechts.*



attention to the customary law of Rome. He maintains that, at least until imperial times, what the Romans understood by customary law was entirely *Juristenrecht*. The *ius privatum*—‘*naturalia praecepta aut gentium aut civilibus*’—was really, from the earliest times, only a part of the *ius civile*: and the *ius civile* means nothing more nor less than *Juristenrecht*.<sup>1</sup> Until, therefore, the emperors take all law unto themselves, the jurists are the most important factor in developing the substantive law. And this is characteristic of all systems. *Mores et consuetudo* cannot become law without the intervention of jurisprudence. But this jurisprudence is not to be considered either as the sole original source of customary law, nor yet as a mere inanimate intermediary. The cardinal error of the historical jurists, in Ehrlich's view, is that they did not distinguish between *legal rules applied by the Courts* (*Rechtssätze*) and *legal arrangements existing in society* (*Rechtsverhältnisse, Rechtseinrichtungen*). These are quite distinct, the one artificial, a product of human reason and logic, the other spontaneous and innate—e. g. family and property law, associations spontaneously formed in society, and the elements of contractual obligation. The function of the jurist is twofold: he must discover by study and sympathy what are the existing streams of legal conviction in the community, and must then formulate uniform generalizations for the arrangements actually existing in society. But the latter of these two functions has a technique of its own, a technique of reasoning quite other than ‘conviction’ and ‘consciousness’, which are in truth not technique at all; and it was because he did not realize this that Savigny frequently mistook for *Rechtsentwicklung* what is peculiar to the ‘art’ of the *Juristenrecht*. On the other hand, Ehrlich cannot go as far as Beseler in entirely

<sup>1</sup> Where a distinct branch of peculiar customary law is recognized, it generally means local law in the provinces: *Soziologie des Rechts*, 357.

dissociating the *Juristenrecht* and the *Volksrecht*. There should be a fundamental accord between them; but it is certain that when the processes of juristic reasoning are brought into play, they will affect the intension and very often the actual form of the usage arising out of the *Volksrecht*.

This dualism in the development of legal institutions may be well illustrated by our own Common Law. More and more we have been compelled by historical research to modify those large claims which have been made from time to time—for example, by Blackstone—for the primordial popular indwelling of our basic legal principles. We have seen that every student of the Common Law constantly has to reckon with the large customary element which it contains; but it is equally well known to all legal historians nowadays that the 'custom of the realm' was in a very large measure the custom of the Courts, not of the people—*Gerichtsrecht* rather than *Volksrecht*. Blackstone, it is true, half-heartedly reproduces what Professor Lambert calls the Romano-Canonical theory of the *consensus utentium*. Having explained that Ulpian's famous principle of *Quod principi placuit*, &c., was always alien to English institutions, he continues:

English  
Common  
Law.

'And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.'<sup>1</sup>

Stephen<sup>2</sup> is careful to omit this hesitating passage: and Blackstone's best-known editor, Christian, enters a caveat against it, quoting Lord Hale to the effect 'that many of those things that we now take for common law, were undoubtedly acts of parliament, though not now to be found of record'. This is no

<sup>1</sup> 1 *Comm.* 74.

<sup>2</sup> 1 *Comm.* (11th ed.) 59 f.

doubt true; but what is even more certain is that 'many of those things that we now take for common law' were developed by His Majesty's Judges. The cardinal fact in the settlement of our medieval law is the gradual domination of a permanent central tribunal over the jurisdiction of local Courts. This process, beginning under Henry I, may be said to have become irresistible under Henry III; royal justice establishes approximate uniformity in essentials as against the bewildering diversity of local custom, and the supreme custom becomes the custom of the King's Court. This does not mean that there is not great variety of usage in manors, boroughs, and localities; but in what may be called the working basis of a general system of justice, the royal Courts carry on, and have ever since continued, a perpetual process of reconciliation and harmonization, so that local divergences, though always respected and often jealously safeguarded, do not impair the symmetry of the main fabric. Beyond doubt, the greater part of this process of consolidation was the conscious task of the king's expert advisers.<sup>1</sup> Its effect has not been fully realized until modern times. Our old books, in the desire to generalize about the principles of the Common Law, are often naïvely unconscious of its artificial ingredients. For example, in the passage already cited<sup>2</sup> from *Doctor and Student*, St. German gives the following as examples of customs 'that properly be called the common law'—the system of Courts and judicature; freedom from arbitrary imprisonment (as confirmed by Magna Carta); freedom and equality of justice; primogeniture and other customs of inheritance; certain feudal customs, such as wardship and marriage; feoffment with livery of seisin; the principle that a term of years is a chattel-real; distress for rent; trial by jury. Excepting perhaps the general principles of 'freedom', there is scarcely an item in this catalogue which cannot be

<sup>1</sup> P. & M. i. 86, 132, 161 ff., *et passim*.

<sup>2</sup> *Ante*, p. 32.

traced to the direct influence of judicial practice, or—e. g. trial by jury—to a direct borrowing or importation. To take one example only, it might be thought that primogeniture is pure native custom. On the contrary, it seems to have been established as a general custom of the realm by the deliberate encouragement of the Judges. It certainly did not occupy the position of a general custom at the end of the twelfth century, but seems to have been regarded as peculiarly appropriate to military tenures. Yet after the lapse of another century, it has become the general rule of descent. The persuasive learning of the Judge is not difficult to detect behind this development.<sup>1</sup>

Wherever we turn, then, we find this constant action and reaction between native customary law and the 'art' of the interpreter. It is exceedingly difficult to say where the one ends and the other begins; but it is certainly impossible, in the face of overwhelming evidence to the contrary, to regard the Judge merely as a mechanical impersonal instrument for the application of self-sufficient customary law. Are we, then, to accept Maine's view in its entirety, and see in the jurist and the doomsman the true fountain and origin of all customary law? The truth seems to lie between these two opposing views.

Many of Maine's examples in *Ancient Law* are taken from the highly instructive, but by no means conclusive, evidence of epic poetry. The broad general principle he states needs larger corroboration than this. M. Lambert covers a wider field; and in his insistence upon the creative power, in so many different circumstances, of *la jurisprudence*, he tends to undervalue a fact which he himself states in express terms. 'Customary law, he says, becomes crystallized in rules elaborated by interpreters;

3. Action and reaction of customary law and expert interpretation.

Custom of socio-logical origin: the jurist 'finds the law', but influences it.

'but the law itself already existed in the form of juridical sentiment, before the first instruments of arbitration were ever established;

<sup>1</sup> P. & M. ii. 262 ff.; Pollock, *First Book of Jurisprudence*, 251.

and it is this juridical sentiment, much more than the labours of arbitrators and judges, which settles the earliest series of precedents, from which springs juristic custom properly so-called—a thing quite distinct from conventional usages or the usages of daily life.'

✓It seems quite impossible, however powerful the effect of interpretation may be, to imagine any creative period in the growth of custom without presupposing this initial 'juridical sentiment' in the community at large. It may be vague and uncertain, capricious in its effects until skilled understanding has disciplined it into manageable forms; but it exists as the *primum mobile* of all efficacious customary law. Maine made a notable contribution to jurisprudence when he emphasized the part played in primitive societies by the codification of customary law; but he certainly exaggerated the creative function of the codifier and the lawgiver. ✓The very word 'lawgiver' is somewhat misleading. Again and again we find the hierophant of justice conceived not as the 'giver' but as the 'finder' of law. Even the semi-divine legislator, in whom we now see the codifier of existing law, is to primitive faith a receptacle of inspiration rather than an inventor of social rules. ✓As for the doomsman, it is true, as Maine insisted, that his influence is to be found everywhere. We Anglo-Saxons have had our *witan*; the Frisians their *asegas*; Scandinavian peoples their *laghmen* and *logsögumathr*; the French their *échevins*, the Germans their *Schöffen*; and it is the same among the Hindus and Brahmins, and all the priestly castes of Roman, Greek, and Celtic peoples. These are the 'learned in the law' to whom the community looks for enlightenment; but they are called upon not to make new rules for new circumstances, but to apply, with special wisdom and skill, those principles which have been developed in social intercourse—crudely, perhaps, but substantially—by necessity, convenience, an elementary sense of justice, or pure imitation. ✓

‘Social customs themselves obviously did not take their origin from an assembly or tribunal. They grew up by gradual process in the households and daily relations of the clans, and the magistrate only came in at a later stage, when the custom was already in operation, and added to the sanction of general recognition the express formulation of judicial and expert authority.’<sup>1</sup>

✓Much, then, of Savigny’s doctrine still contains an important lesson for modern students of law: there is a native law of the community, and its origins are to be found in sociological, not in artificial, elements. But in the development of this fundamental law, interpretation by constituted authority plays an indispensable part, and this in an increasing degree as the system of law develops into more complex but more settled forms. Ehrlich’s chief criticism of the Historical School seems to be just. We must distinguish between the spontaneous social *Rechtsverhältnisse* which establish themselves by inscrutable processes in communities, and the learned and logical science of the *Juristenrecht*. ✓The perpetual process of interpretation must inevitably produce an equally perpetual metabolism in the subject-matter of usage. Customs become modified, sometimes to such an extent that they cease to exist. ✓But always the jurist or the magistrate has to deal with practices springing in the first instance from actual social relationships. —He never creates or invents custom, in the true sense of those words. Herein again we see the fallacy of the Austinian doctrine that custom ‘is not law’ until it has been pronounced upon by a Court. The exact reverse is the truth. Custom is the first and most essential law; ✓but as logic, sometimes good and sometimes bad, is brought to bear upon it, it necessarily changes its original character, often becomes essentially transmuted, and sometimes ceases altogether to claim or possess binding force.

<sup>1</sup> Vinogradoff, *Historical Jurisprudence*, i. 363.

## II. APPLICATION OF CUSTOM

Custom  
contains  
its own  
legal  
validity.

The scope of custom diminishes as the formulation of legal rules becomes more explicit and as a more elaborate machinery is set up for the making and administering of law. Though minor customs and usages are constantly springing up even nowadays, especially in commercial relationships, the great formative period of the more important customs belongs to the past. Ancient customs, however, are still an integral part of modern law, and the Courts frequently have to deal with them. Do they deal with them *as law*, or as something which, existing *de facto*, may be *turned into law* by *ex cathedra* sanction? I conceive the former proposition to state the true principle.

The primary function of judicial analysis is to examine the nature and reality of *existing* custom, not to invent new customs or arbitrarily to abolish those which are proved to exist in immemorial practice. In this respect English law is peculiarly instructive, because our Courts have built up a system of well-defined principles for this task of judicial analysis. We shall find that their chief purport is to determine whether the general and particular customs of our law are, *as a matter of established fact*, well grounded in social practice. Beyond this English Courts go seldom, if ever; and it is, I submit, a mistake to represent modern judges as exercising anything like a critical creative faculty with regard to established usages. To this extent custom is still self-contained, self-sufficient, and self-justified law in England—that, in the main, with exceptions which will be presently noted, and which do not seriously affect the guiding principle, *if a custom is proved in an English Court by satisfactory evidence to exist and to be observed, the function of the Court is merely to recognize the custom as operative law.* In other words, the custom does not derive its validity from the authority of the Court; even the ‘sanction’ of the

It is  
recognized  
as law if it  
satisfies  
certain  
tests.

Court amounts only to formal recognition in case of dispute. But in order to merit recognition, the custom has to satisfy certain tests, all of which tend in one direction—proof of the actual existence and operation of the custom. ✓

In approaching this subject, we must first note two elementary and unvarying characteristics of custom in modern society.

✓First, every custom is in some fundamental respect an *exception* from the ordinary law of the land.<sup>1</sup> Custom exceptional and limited.

Second, every custom is *limited* in its application. It does not apply to the generality of citizens, but only to a particular *class* of persons or to a particular *place*. Although it must always govern a plurality of persons—for there is no such thing as a custom inherent only in one person,—the plurality must be restricted. ✓

These two rules really amount to stating the same proposition in two different ways. ✓ A custom applying to all the king's subjects is not truly a custom at all in the legal sense, for, as Coke says,<sup>2</sup> 'that is the common law'.<sup>3</sup> Customs, then, are *local variations* of the general law. But they must never be more than variations. They can never be set up against a positive rule of statutory law. If an Act of Parliament lays down that every pound avoirdupois throughout the kingdom shall be 16 oz.,<sup>4</sup> a local custom that every pound of butter sold in a certain market shall be 18 oz. is bad and unenforceable.<sup>5</sup> ✓ The London Stock Exchange, despite the express provisions of Leeman's Act,<sup>6</sup> persistently refuses to specify the serial numbers of the shares in a contract for the sale of banking shares; <sup>7</sup> underwriters constantly disregard s. 4 of the Legality.

<sup>1</sup> Co. Litt. 113a; Com. Dig. *Copyhold* (S), 4; *Horton v. Beckman* (1796), 6 T.R. 760, 764.

<sup>2</sup> Co. Litt. 110b.

<sup>3</sup> As to the 'custom of the realm', see *ante*, p. 32, n. 1.

<sup>4</sup> 13 & 14 Car. II, c. 26.

<sup>5</sup> *Noble v. Durell* (1789), 3 T.R. 271.

<sup>6</sup> 30 & 31 Vict., c. 29.

<sup>7</sup> *Perry v. Barnett* (1885), 15 Q.B.D. 388.



Marine Insurance Act, 1906, which provides that every insurer of a cargo or bottom must have an 'insurable interest' in the same;<sup>1</sup> but the Courts could not, without bringing statute law into contempt, countenance such customs. If a statute plainly conflicts with a pre-existing custom, the latter is automatically abrogated. ✓

Neither can a custom conflict with any fundamental principle of the Common Law.<sup>2</sup> It is one thing for a custom to be a local variation of the general law, another for it to negate the very spirit of law. It is, as we shall see, sometimes a nice problem to decide which of these two effects a custom produces. ✓

Proof of  
existence.

As for the other recognized tests, they can be distinguished and classified by many different methods.<sup>3</sup> For convenience, and because they are the most commonly accepted, I adopt here those given by Blackstone, who follows in the main Coke on Littleton. It will be found that they all serve one main purpose, as has been already suggested—viz, proof of the existence of the custom. ✓ It is an ancient principle of our law that a custom, since it claims a privilege out of the ordinary course of law, is *stricti iuris*,<sup>4</sup> especially if it 'goes to the destruction of an estate'—i. e. derogates from vested rights of property.<sup>5</sup> Customs go back into distant ages; they are set up with various motives for the furtherance of various interests, and the initial problem is always whether the custom prayed in aid

<sup>1</sup> *Cheshire v. Vaughan*, [1920] 3 K.B. 240.

<sup>2</sup> *Smith v. Lane* (1585), And. 191; *Peplow v. Rowley* (1615), Cro. Jac. 357.

<sup>3</sup> See Jethro Brown, *Austinian Theory of Law*, 315 ff.

<sup>4</sup> *Zinzan v. Talmage* (1680), Pollex. 561. The expression, as meaning simply 'requiring strict proof', is of course an inaccurate rendering of the Roman term *stricti iuris*. 'All customs which are against the common law of England ought to be taken strictly, nay very strictly, even stricter than any act of Parliament that alters the common law': per Trevor C.J., *Arthur v. Bokenham* (1708), 11 Mod. 148, 160.

<sup>5</sup> *King v. Dilliston* (1689), 3 Mod. 221, 224.

has a good foundation *in fact*. This finding of fact is for the jury;¹ but the 'judicial tests' are applied as matter of law to determine in the first place whether there is any evidence on which the jury can find the custom proved. The question of fact, though the principal, is not the sole consideration. In a modern State, the Court has power to say at once that the custom, even if proved to demonstration, is contrary to a subsequent positive rule of law, and must be discontinued.✓ Further, it has always been laid down that the Court has power to declare a custom, though proved in fact, unreasonable in its origin and no longer to be observed. As I shall attempt to show, this latter rule belongs to theory rather than practice and has little effect upon the operation of custom in English law.

For the rest, the 'judicial tests' are only various modes of weighing the evidence for and against the existence of alleged customs.✓ Let us consider them seriatim.

✓The first is that the custom must have existed from time immemorial, 'time whereof the memory of man runneth not to the contrary'. This, by its very statement, is purely a question of continuous, and therefore certain, existence. A mere habit, practice, or fashion which has existed for a number of years nobody supposes to be *ipso facto* an obligatory custom: antiquity is the only reliable proof of resistance to the changing conditions of different ages.✓ But antiquity is a relative term, and if it were applied as a test without qualification, every custom would necessitate indefinite archaeological research. Our law, therefore, has set an arbitrary but convenient limit to 'legal memory', fixing it at A. D. 1189, the first year of the reign of Richard I. This was established by analogy with the period of limitation, fixed by the Statute of Westminster, 1275, for the bringing of writs of right. As

¹ 1 Bl. *Comm.* 75. See *ibid.* for the special and curious mode of proof for Customs of London.

time went on, the period dated back to 1189 became inconveniently long.<sup>1</sup> In the law of prescription, as is well known, a legal fiction was introduced that twenty years' uninterrupted user raised the presumption of a lost grant by the Crown.<sup>2</sup> This fiction invented for prescription did not apply to custom; for, as we have seen, custom involves a plurality of persons, and the notion of a grant therefore has no relevance, an indefinite number of persons not being 'capable grantees'.<sup>3</sup> If, then, a custom has existed for a long time (no definite period can be specified for all cases) and there is no actual disproof of it since 1189, then there is a strong presumption that it has existed from time immemorial, and unless any other objection can be maintained against it, it will be upheld.<sup>4</sup> On the other hand, though the custom may have existed for centuries, yet on proof by fact or irresistible inference that it cannot have existed in 1189, it must be rejected. Thus in *Simpson v. Wells* (1872), L.R. 7 Q.B. 214, the appellant was charged with having obstructed a public footway by setting up a stall for the sale of refreshments. His defence was that he had done so by virtue of a custom existing at a 'statute sessions'—i. e. a fair held for the purpose of hiring servants and for proclamation of the current rate of wages. It was proved that the statute sessions were of great antiquity, having been held before the passing of 5 Eliz., c. 4; and the custom of setting up stalls was proved to have been in force for at least fifty years. Statute sessions were, however, authorized by the Statutes of Labourers, the first of which was passed in the reign of Edward III.

<sup>1</sup> As to the stages by which the prescriptive periods became established, see Holdsworth, *H. E. L.* vii. 343 ff.

<sup>2</sup> Lord Blackburn was of opinion that this doctrine did not finally establish itself till about the end of the eighteenth century: *Dalton v. Angus* (1881), 6 App. Cas. 740, 811 ff.

<sup>3</sup> *Constable v. Nicholson* (1863), 14 C.B.N.S. 230; Holdsworth, *H. E. L.* iii. 170.

<sup>4</sup> *R. v. Folliffe* (1823), 2 B. & C. 54.

They therefore could not have existed in 1189, and the appellant's plea failed.

It should be added that a distinction is often drawn between customs properly so called and *usages* of a particular trade, or those local usages which are termed 'customs of the country'—e. g. those affecting the relations of landlord and tenant and the reciprocal rights of incoming and outgoing tenants, and certain agricultural and mercantile customs. These are usually based on contract, express or implied, and the rule of immemorial antiquity does not apply to them; any long-established user, supported by notoriety, is sufficient.<sup>1</sup>

✓Blackstone's next rule is that of *continuance*.<sup>2</sup> Interruption within legal memory defeats the custom. He draws a necessary distinction between the interruption of the *right* and of the mere *possession* of the thing over which the right is asserted. ✓

'As if the inhabitants of a parish have a customary right of watering cattle at a certain pool, the custom is not destroyed though they do not use it for ten years; it only becomes more difficult to prove: but if the *right* be anyhow discontinued for a day, the custom is quite at an end.'

This test of continuity clearly goes to proof of existence. It is most improbable, almost inconceivable, that if a right truly exists by custom, it will be abandoned even for the shortest time by those who are entitled to the benefit of it. ✓Hence we find Jessel M.R. saying that if the disturbance or interruption of an alleged custom has existed for any considerable period, a strong presumption arises that there never was any such custom at all.<sup>3</sup> ✓

✓The next rule is that the custom must have been enjoyed *peaceably*. To this we may add that the right

Continu-  
ance.

Peaceable  
enjoy-  
ment.

<sup>1</sup> *Dalby v. Hirst* (1819), 1 B. & B. 224; *Goodwin v. Roberts* (1875), L.R. 10 Ex. 337; *Tucker v. Linger* (1883), 8 App. Cas. 508.

<sup>2</sup> Co. Litt. 114b (S. 170): 'Continua dico ita quod non fit legitime interrupta': *ibid.* 113b.

<sup>3</sup> *Hammerton v. Honey* (1876), 24 W.R. 603.

claimed must have been exercised *nec clam nec precario*—neither by stealth nor by revocable licence. It is sufficiently obvious that a 'custom' which has only been wrested from the public by the strong hand is not a custom at all; for, as Blackstone observes, 'as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent is wanting'. A *secret* legal custom clearly cannot have any real existence, and so far as I am aware no instance of such an anomaly has come before the Courts.<sup>1</sup> The law is public, if it is anything. Nor can a 'custom' existing by mere revocable licence have any legal reality, since it depends on the will of an individual or group of individuals, not on public recognition or observance. ✓ In *Mills v. Mayor, &c., of Colchester* (1867), L.R. 2 C.P. 476, the owners of an oyster fishery had, since the time of Elizabeth, held courts at which they granted, on payment of a reasonable fee, licences to fish. Application might be made by any person within certain parishes who had been apprenticed for seven years to a licensed fisherman. The plaintiff possessed the necessary qualifications and was ready and willing to pay the fee, but the fishery court refused to grant him a licence. It was held that it could not be compelled to do so, since there had never been in the inhabitants of the parishes any enjoyment *as of right* so as to give rise to a custom. ✓

Obliga-  
tory  
force.

✓ The three aspects of this rule therefore aim at determining whether the alleged custom has ever existed as a custom at all. It is further implied in the rule, and later expressly stated by Blackstone, that the custom must be supported by the *opinio necessitatis*. The public concerned in the usage must regard it as obligatory and binding, not as merely facultative. ✓ There is a difference between a habit and a legal custom. It is obligatory to

<sup>1</sup> *Barr v. Vandall* (1664), Ch. Cas. 30, cited in *Vin. Abr.* 188, for the rule that 'custom cannot be grounded upon fraud', refers to fiscal customs.

wear clothes; it is not obligatory to wear white flannels when playing cricket. On the other hand, it is more than a mere fashion which compels a barrister to wear wig and gown in Court; the custom is legally compulsory, because if, without reasonable excuse, the barrister ignores it, the Court will not listen to him and he will be prevented from exercising his calling. Wig and gown are a great nuisance in certain temperatures, but counsel wear them because they hold the opinion that it is *necessary* to do so. ✓ Again, says Blackstone, 'a custom that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all'. ✓

✓ Then the custom must be *certain*.<sup>1</sup> This is purely Certainty. a rule of evidence. The Court must be satisfied by clear proof that the custom exists as a matter of fact or legal presumption of fact. ✓ For the purpose of making and repairing grass-plots in their gardens and for the improvement thereof, all the customary tenants of a manor having gardens in their tenements claim a right by immemorial custom to carry away from the manorial waste-land 'such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent every year, at all times in the year, as often and in such quantity as occasion' may require.<sup>2</sup> The Court rejects the custom. ✓ 'A custom,'

<sup>1</sup> *Millechamp v. Johnson* (1746), Willes 205 n.; *Selby v. Robinson* (1788), 2 T.R. 758. In *Anon.*, Y.B. 12 & 13 Ed. III (R. S.) 236 (cited *Tanistry Case* at p. 33), a usage was set up that in Hereford a man could sell his land when he could measure an ell and count up to twelve pence; held void for uncertainty, 'for one person is twenty years old before he knows how to measure an ell, and another knows how when he is seven years old'. The Court was clearly unconvinced of the existence of any such custom as alleged. Parker J. considered that in any case such a custom would be contrary to a fundamental rule of Common Law: *Johnson v. Clark*, [1908] 1 Ch. 303, 311 f.

<sup>2</sup> *Wilson v. Willes* (1806), 7 East 121.

says Lord Ellenborough C.J., 'however ancient, must not be indefinite and uncertain; and here it is not defined what sort of improvement the custom extends to. . . There is nothing to restrain the tenants from taking the whole of the turbary of the common, and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom as laid but fancy and caprice.' The Court clearly thinks it incredible that such a custom really exists. 'As laid', it is not a custom at all; those who claim the benefit of it have either misunderstood or exaggerated their rights. The true view is expressed by Willes C.J. in *Broadbent v. Wilkes* (1742), Willes 360, where he says that a custom must be certain 'because, if it be not certain, it cannot be proved to have been time out of mind, for how can anything be said to have been time out of mind when it is not certain what it is?' And to the same effect Jessel M.R.: 'When we are told that custom must be certain—that relates to the evidence of a custom. There is no such thing as law which is uncertain—the notion of law means a certain rule of some kind.'<sup>1</sup>

Con-  
sistency.

✓ Lastly, customs must be *consistent* with each other; one custom cannot be set up in opposition to another. For if both are really customs then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. ✓ Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.<sup>2</sup>

<sup>1</sup> *Hammerton v. Honey* (1876), 24 W.R. 603; see also *Blewett v. Tregonning* (1835), 3 A. & E. 554. In the *Tanistry Case* (1608), Dav. at p. 33, the reason given for the rule is that 'that does not lie in prescription which lies in the will of man, for the will of man is uncertain'.

<sup>2</sup> 1 Bl. Comm. 78. 'When a man has a lawful easement or profit by prescription from time whereof, etc., another custom, which is also

There does not seem to be much in this rule beyond the unquestionable truth that if two customs *in pari materia* (and presumably in the same locality or applying to the same persons) are manifestly incompatible, then one of them is incorrectly called a custom. It remains for the parties concerned to prove by appropriate evidence which of the two really exists. Both of them clearly cannot do so.

✓The last and most difficult test is that of *reasonableness*. The true rule seems to be not that a custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable.<sup>1</sup> This is not merely a distinction without a difference, for it seriously affects the *onus probandi*. The party who has proved the existence of a custom is not under the further necessity of proving its reasonableness; it is for the party disputing the custom to satisfy the Court of its unreasonableness. The question of reasonableness is one of law for the Court, not of fact for the jury.<sup>2</sup> ✓The standard which the Courts apply has recently been defined by a Divisional Court of the King's Bench as 'fair and proper, and such as reasonable, honest and fair-minded men would adopt'.<sup>3</sup> Brett J., with a characteristic leaning

Reason-  
ableness.

from time whereof, etc., can't take it away, for the one custom is as ancient as the other: as if one has a way over the land of A to his freehold by prescription from time whereof, etc., A can't allege a prescription or custom to stop the said way': *Aldred's Case* (1610), 9 Rep. 58, citing *Bland v. Moseley*. Cf. *Spooner v. Day* (1636), Cro. Car. 432.

<sup>1</sup> Co. Litt. S. 80. 'Every custom supposes a law, and if it be not irrational, and entertains no contradictions, it is good': per Vaughan C.J., *Collsherd v. Jackson* (1672), Freem. K.B. 63, 64. Cf. Keating J., *Paxton v. Courtney* (1860), 2 F. & F. 131, and Parker J., *Johnson v. Clark*, [1908] 1 Ch. 303, 309, 311.

<sup>2</sup> Co. Litt. S. 80; 1 Bl. Comm. 77; *Bastard v. Smith* (1837), 2 Moo. & R. 129, 135.

<sup>3</sup> *Produce Brokers' Co. v. Olympia Oil and Cake Co.*, [1916] 2 K.B. 296, 298, following *Paxton v. Courtney*, *ubi sup.* 'It seems to me that before the Court can say that a custom, not sought to be introduced against an ignorant purchaser, but known to both parties to the



towards wide generalization, states the test still more broadly: 'Whether it is in accordance with fundamental principles of right and wrong.'<sup>1</sup>

Examination of the numerous cases in point leads to the conclusion that the 'fundamental principles of right and wrong' upon which Courts have held customs to be unreasonable, resolve themselves broadly into the following sets of circumstances:

1. On the facts of many cases, the question whether or not a custom is reasonable is indistinguishable from the question whether there is any evidence to go to the jury of its existence. Frequently the two aspects of the matter are treated as inseparable.<sup>2</sup> This is true when the custom or usage in question is alleged to be actually observed at the present time; it is also true when the Courts have to determine whether a custom proved to have existed for some time past possesses the quality of immemorial antiquity. Its very nature, as alleged, may show that it cannot really have existed in the social and economic conditions of a distant age. Thus in *Bryant v. Foot* (1868), L.R. 3 Q.B. 497, the rector of a parish claimed that by custom a fee of 13s. was payable on the celebration of every marriage in the parish. The fee was shown to have been customary for forty-eight years, and it was argued that this raised a presumption of immemorial antiquity. But the Court, being at liberty to draw inferences of fact, had no difficulty in holding that in the reign of Richard I such a fee would have been grossly unreasonable according to the value of money in the Middle Ages.<sup>3</sup>

contract, is unreasonable, it has to say the custom outrages justice and common sense': per Rowlatt J., at p. 301. The matter in question was a commercial usage, but the same principle applies to all customs.

<sup>1</sup> *Robinson v. Mollett* (1875), L.R. 7 H.L. 802, 817 (also a commercial usage).

<sup>2</sup> e. g. *Daun v. City of London Brewery Co.* (1869), L.R. 8 Eq. 155; *Nelson v. Dahl* (1879), 12 Ch. D. 568; *Gibbon v. Pease*, [1905] 1 K.B. 810.

<sup>3</sup> Contrast a case which immediately followed that cited above,

Here it is plain that the Court was really deciding that in the reign of Richard I the alleged custom did not in fact exist.

2. 'Sometimes the term 'unreasonable' is used of a custom which is found to be contrary to statute or to a fundamental rule of Common Law.<sup>1</sup> In such a case it is really 'illegal' rather than unreasonable, and, as we have seen, is inadmissible.

3. A custom must be notorious, and cannot avail against a party who did not know, could not be expected to know, and was under no duty to know of its existence. The Courts constantly have to guard against the insinuation of usage into contracts for the benefit of one party only, especially in commercial causes. 'Customs of trade', says Brett J.,<sup>2</sup>

'as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the Courts, of some rule of law to business, and which application has seemed irksome to some merchants. . . . When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person ignorant of it, is unreasonable, contrary to law, and void.'

What is said of commercial usages is true of all customs; hence the rule, already noted, that customs are to be regarded as requiring strict proof. A custom may

*Lawrence v. Hitch* (1868), L.R. 3 Q.B. 521, where the Court refused to apply the same reasoning to a toll of 1s. per cart-load levied on vegetables.

<sup>1</sup> e. g. *Perry v. Barnett* (1885), 15 Q.B.D. 388.

<sup>2</sup> *Robinson v. Mollett* (1875), L.R. 7 H.L. 802, 817.

be one-sided for the following reasons, aptly tabulated in Comyns's Digest :<sup>1</sup>

(a) If it be 'to the general prejudice, for the advantage of any particular person',<sup>2</sup>

(b) If it be 'to the prejudice of any one, where there is not an equal prejudice or advantage to others in the same case',<sup>3</sup>

(c) If it be 'that any one shall be judge for himself'; or, as it is more commonly put, 'that a man shall be judge in his own cause',<sup>4</sup>

(d) If it 'imports a loss on one side, without a benefit in consideration',<sup>5</sup>

These are elementary considerations of fairness; in applying them, and holding that a custom is unreasonable because it is one-sided, the Court is saying in effect that it is not a custom at all, and there is a strong presumption against its ever having been a custom known and followed.

<sup>1</sup> Tit. *Copyhold* (S), (s. 3), (ss. 13, 14, 15, 18).

<sup>2</sup> 'As, a custom that no commoner shall put his cattle on the common till the lord has put his cattle there; that no tenant shall marry his daughter till he pays a fine to the lord; that the lord shall take the cattle of a stranger levant and couchant upon the land, for his heriot; or shall take £3 of every stranger for a pound-breach; that a tenant shall be amerced if he does not put his cattle in the lord's pound.' All these examples are taken from *Tanistry Case*, *loc. cit.* A few others are added from the Year Books.

<sup>3</sup> 'As, that the sheep of several owners upon the same tenement shall be counted *insimul*, and decimated; for one may pay all his lambs for tithes, and another nothing': *Barker v. Cocker* (1621), Hob. 329.

<sup>4</sup> 'As, that the lord shall detain a distress taken upon his demesnes, till fine made for the damage, at his will': *Tanistry Case*, *loc. cit.* Cf. Co. Litt. s. 212; *Wood v. Lovatt* (1796), 6 T.R. 511.

<sup>5</sup> 'As, that a lord of a manor shall have the best anchor and cable of every ship that strikes upon soil within his manor and perishes there, though it be not a wreck': *Geere v. Burkensham* (1683), 3 Lev. 85; *Simpson v. Bithwood* (1692), 3 Lev. 307. 'So, a custom that every ship which passes the river shall pay such a sum, because the City, etc., maintains a key for all goods unladen in the same city; for this does not extend to ships which do not unlade there': *Haspurt v. Wills* (1671), 1 Vent. 71.

4. It is well settled that the time to decide the reasonableness of a custom is the time of its origin.<sup>1</sup> Now it is said that if a custom has *not* a rational basis, but has 'resulted from accident or indulgence, and not from any right conferred in ancient times upon the party setting up the custom', there is then strong evidence that the custom is unreasonable and unenforceable.<sup>2</sup> It is not clear what is meant by 'indulgence' in this connexion, nor what is the relevance of 'conferring' (which presumably means granting) a right which arises by custom. As to 'accident', this cannot be considered a fatal objection to custom, for, as we have seen, it is impossible to find a deliberate and rational cause for every custom. These, therefore, do not seem to be valid grounds for rejecting a custom as unreasonable. The fact is that in the great majority of cases in which an ancient custom has been held to be unreasonable in its origin, it will be found that the real reason for rejecting it is that it was originally, or is now (or both), contrary to a well-established rule of law. When, for example, in the famous *Tanistry Case* (1608), Dav. 29, English Judges, accustomed to the rule of primogeniture, had to consider the validity of the Irish Brehon law of succession, they were faced with the apparently barbarous rule that the property descended not to the eldest-born, but to the *senior et dignissimus* of the blood and surname of the last owner. There was no doubt of the existence of the custom, the origin and purport of which, as Maine has shown,<sup>3</sup> the English Judges did not fully understand. One of the chief reasons they assigned for rejecting the custom as 'encounter the Commonwealth' was that in practice it destined the property not to the *senior et dignissimus*, but to the 'most potent'—a moral argu-

<sup>1</sup> *Tyson v. Smith* (1838), 9 A. & E. 406, 423; *Mercer v. Denne*, [1904] 2 Ch. 534, 557.

<sup>2</sup> Per Lord Cranworth, *Salisbury v. Gladstone* (1861), 9 H.L.C. 692, 701.

<sup>3</sup> *Early History of Institutions*, Lect. VII.

ment against the triumph of might over right. But no modern reader can fail to detect in the case a deep-seated prejudice against a custom which outraged feudal law by admitting a gap in the seisin, and by excluding daughters from the inheritance on the failure of heirs male; indeed, as Maine observes, 'the judges thoroughly knew that they were making a revolution, and they probably thought that they were substituting a civilized institution for a set of mischievous usages proper only for barbarians'. Among the older precedents, the case just cited is the most authoritative, and is, indeed, the source of much of the chief learning in English law on the subject of custom. If we turn to a leading modern case on the same point, we find a similar view expressed in terms by an eminent Chancery Judge. In *Johnson v. Clark*, [1908] 1 Ch. 303, a married woman, in order to secure a debt due upon a promissory note, purported to convey, by way of mortgage to the creditor of the promissory note, certain property in which she had a life interest under her father's will. The conveyance was made with her husband's concurrence, but without any separate examination of the wife. The wife sought to have the mortgage set aside on the ground that without separate examination it was void in law. Against her it was contended that her estate was held in burgage tenure and that a local custom existed under which real property so held by a married woman could be disposed of by her with the consent of her husband without her separate examination and acknowledgement. Parker J. held that such a custom was repugnant to a principle of the Common Law vital at the time the mortgage was made (though since abolished). Dealing with the question of reasonableness, he said:

'Looking at the matter apart from express authority, it is quite clear that for a custom to be good it must be reasonable or, at any rate, not unreasonable. The words "reasonable or not unreasonable" imply an appeal to some criterion higher than

the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims. On the other hand, it is not the reason of the average human being to which appeal is made. Littleton says of customs: "Whatsoever is not against reason may well be admitted and allowed"; and on this Sir Edward Coke comments: "This is not to be understood of every unlearned man's reason, but of artificial and legal reason warranted by authority of law": Co. Litt. 62a. If this be so, it appears to follow that a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate, not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system.

The general effect of these tests of custom in English law, however they are classified, is a strict method of proof of a custom's existence. In the particular matter of reasonableness, the Courts reserve to themselves a right of discountenancing or abrogating a pernicious custom. 'Malus usus abolendus est' is an accepted maxim of our law.<sup>1</sup> But it is very rarely indeed that a Court rejects a custom on the ground that it was unreasonable *in its origin*.<sup>2</sup> In holding the origin to have been unreasonable, the Court nearly always doubts or denies the actual origin and continuance of the custom *in fact*. Further, the unreasonableness of a custom in modern circumstances will not affect its validity if the Court is satisfied of a reasonable origin. 'A custom once reasonable and tolerable, if after it becomes grievous, and not answerable to the reason whereupon it was grounded, yet it is to be taken away by Act of Parliament'<sup>3</sup>—i. e. by nothing short of statute. But where the Court finds a custom in existence which, either by aberration or by a change in law since the origin of the custom, not merely differs from but directly conflicts with an essential legal principle,<sup>4</sup> it has power in modern communities to put an

Conclu-  
sions as to  
tests of  
custom.

<sup>1</sup> Co. Litt. s. 212.

<sup>2</sup> See App. B, *post*, p. 359.

<sup>3</sup> 2 Inst. 664.

<sup>4</sup> Or principle of public policy: *Johnson v. Clark, ubi sup.*

end to the custom. In short, custom, once indisputably proved, *is law*; but the Courts are empowered, on sufficient reason, to change the law which it embodies.<sup>1</sup>

### SUMMARY

Reviewing our conclusions with regard to custom as a source of law: Legal custom is distinct from other social customs in that its obligatory sanction is complete and effectual. In early forms of society the conduct of men in forming legal relationships is governed by customary rules. These are recognized and followed as *law* independently of any 'sovereign' injunction or enforcement. It is a misunderstanding of the evolution of law and the conditions of primitive society to regard customs merely as 'positive morality' until they have been expressly ratified by some determinate law-making authority. The great majority of customs are non-litigious in origin, and depend for their rise and observance on *de facto* conduct and repetition rather than on the *de jure* pronouncement of magistrates. The importance of custom as a source of law is not entirely confined to the early stages of social growth; it has always been a primary factor in English law and is the basis of many of our most fundamental Common Law principles, which consist much more of spontaneous elements than of artificial commands and prohibitions. It also repeatedly asserts itself in those foreign civilizations with which British administration of justice has to deal. Not only in English, but in all civilized jurisprudence it has always been recognized as greatly influencing the development of legal institutions. Roman Law, though its theory in this respect was not conspicuously clear or consistent, attributed an important function to custom, constantly recognizing its effect both in substantive and in adjective law, though assigning to it a secondary position as com-

<sup>1</sup> On judicial tests of foreign customs, see App. A, *post*, p. 357.

pared with the supreme legislative instrument of the imperial régime. In modern jurisprudence, the Historical School of Germany has found in custom the true source of all law, deriving it from the 'common consciousness of the people', or *Volksgeist*; and in the view of this school, law is valid and just only in so far as it makes known and embodies in concrete forms the inherent legal instincts of the community which it purports to govern. All law, therefore, according to this theory, should take its rise from, and so far as possible accord with, popular observance; and the artificial manufacture of legal rules, without regard to popular consciousness, is based upon a fallacy which is certain to exhibit itself in a breakdown of the practical workings of the law thus factitiously produced. This view needs modification, for it seems impossible to attribute all customs to a general conviction among the community as to their necessity, rightness, and appropriateness.

✓ Customs are often the product not of a widespread conviction, but of the convenience or interest of a ruling class which imposes its will on the majority of society. Many are purely local in origin, and many are the result of mingled influences which cannot be called peculiarly popular or national. Further, it is necessary to distinguish between the inner and the outer manifestations of custom. In an embryonic state of social life it is not always possible to suppose that the concrete practice of certain customs is inspired by any conscious abstract feeling or motive. ✓ The *conduct* embodied in custom is the *corporate* action of an aggregation of individuals. In this corporate action, rules and observances present themselves in concrete forms rather than as abstractions intellectually grasped and applied. Law is here a fact rather than an idea. ✓ In its earliest manifestations, therefore, custom grows by the force of practical example far more than by the impulse of reasoned conviction. The 'conviction', if any, which lies behind the majority of customs consists



in the fact that there is usually some reason for them in practical necessity or convenience. ✓ This reason may not always be apparent at first sight, but can generally be discovered on closer inspection. But there are many customs which cannot be connected with any deliberate process of reasoned conviction and choice. Some consist of a selection between two indifferent alternatives: and the selection, once made, is followed and tends to become obligatory by repetition. ✓ Others, though originally prompted by some consideration of expediency, cannot become settled as rules without fixing arbitrarily some particular mode of observance, which is adopted for motives of practical convenience rather than of rational apprehension. ✓ In these cases, and indeed throughout the whole operation of custom, a force of imitation, quite outside logical and utilitarian factors, exerts a powerful influence over men's minds, and is often responsible, fortuitously rather than deliberately, for the rapid and extensive adoption of particular customs. ✓ It is probable that the effect of this imitative fascination, which is of obscure psychological origin but is based upon the necessity for the individual to follow the line of least resistance in conforming to the ordinary circumstances of his environment, has been underrated in current theories as to the compulsive force of custom.

✓ Another perennial element in the consolidation of customary law is the effect upon it of judicial interpretation and application. As societies acquire regular organs for the administration of justice, it is inevitable that an expert control should be exercised over real and alleged customary rules of law. ✓ History supplies abundant examples of a direct moulding influence on custom by lawgivers, codifiers, jurists, and magistrates. This intervention of interpretation grows as society progresses; ✓ and it is impossible, on the evidence, to conclude that the interpreters are or should be nothing more than representatives of a popular instinct in the

exercise of their expert function. Interpretation becomes a technical, specialized science, and the personality of the interpreter is certain to enter into and materially affect the substance of the customary law with which he deals. ✓The form, and often the content itself, of many customs which appear to spring from mere usage, can in many cases be shown to be derived from technical rules evolved by interpreters and tribunals. But custom must not be conceived as being purely a creation of judicial technique. The relation between indigenous customary law and technical treatment of it is one of action and reaction. The materials with which the interpreter has to deal are not manufactured by him; they grow spontaneously out of certain fundamental legal relationships and out of a certain characteristic habit of mind in the community towards law. The interpreter's task is to *find* these fundamental principles in the materials available to him. ✓But in the process of 'finding' and applying, it is inevitable that he should impress his own personal cast of thought upon them; and in this way customs become radically affected, either by limitation or extension, in their treatment by expositors of law. ✓It is, however, even in modern societies whose courts are the supreme interpreters of law, an essential characteristic of custom that it is not created by the jurisdiction of tribunals or any other determinate legal authority, but is merely scrutinized by them in order to ascertain the actual observance and validity of the alleged custom as an existing fact in society. If satisfied by its scrutiny, the Court recognizes the custom as being valid existing law obligatory on those who come within its ambit. In English law, which has a well-defined system of judicial examination in this matter, most of the tests established by Common Law precedents go to proof of the existence of the custom in dispute. As most, though not all, customs have a rational basis in utility and convenience, a custom satisfactorily proved to

hold sway in fact is self-justified and recognized by the Courts as good law. ✓But modern States entrust their tribunals with a power of adjudging custom by standards of positive legality and public policy. No custom can be allowed to run counter to a fundamental principle of Common or Statute Law, though it may be an exception to it; and any custom which, though good in its origin, conflicts with a rule of law subsequently made, is thereby abrogated. ✓Few if any customs are in this sense illegal or unreasonable or mischievous in their origin; but, if a Court should deem them to be so, or should hold them to be contrary to a legal principle later in origin than the custom itself, it has, and is bound to exercise, the power of suppressing the custom from thenceforth. ✓Existing custom is therefore law: if it is not called in question, it operates as part of the general law of the land: if it is called in question, and is proved to exist as a local variation of the ordinary law, and further is not shown to violate any essential general legal principle, it is recognized (not created, or even confirmed) by judicial authority as good law. If it is not proved to exist, it is necessarily declared not to be law and to have no binding force; and further, if, in rare cases, though proved to exist in fact, it is held to be mischievous or inequitable in tendency, it is abrogated by the Court and thenceforth is of no binding force.

### III

## PRECEDENT: NATURE AND HISTORY

### I. THEORY OF JUDICIAL DECISION

THE process of judicial decision may be regarded as either *deductive* or *inductive*, and the function of the judge will differ widely according to which of these two views is adopted.

The first theory, associated principally with codified systems, assumes that the legal rule applicable to any particular case is fixed and certain from the beginning, and all that is required of the judge is to apply this rule as justice demands, without reference to his own personal view of the law. His decision is deduced directly from general to particular—from the general legal rule to the particular circumstances before him. He is not necessarily influenced by the deductions of other tribunals; it is to the stable general principle that he owes his allegiance in all circumstances, not to the possibly unstable interpretations of others. It follows that no individual decisions contain any future authority in themselves. They are not, however, without value and it is no part of the judge's duty to ignore them. It has never been claimed, even in the most rigidly codified systems, that the judge should shut his mind to the reasoning of others in like circumstances. No intelligent system would so crudely paralyse the indispensable instruments of analogy and parity of reasoning. Hence in all systems, some degree of judicial uniformity is certain to exist and even to be applauded. But great care is taken to 'save' the fundamental rule that uniformity, however convenient, shall not degenerate into a line of least resistance; it must remain a guide, and never become a master. In this theory, it is of the essence of the whole administra-

1. Two  
opposing  
views—  
deductive  
and  
inductive  
methods.

tion of justice that the magistrate should never be hampered in his absolute discretion of applying the relevant rule of law and justice as seems best to him.

✓The second theory, characteristic of English law, starts with the same necessary object of finding the general rule applicable to the particular case; but its method is wholly different. It does not conceive the rule as being applicable *directly* by simple deduction. It works forward from particulars to the general. Where the French judge has to find his master principle in formulated propositions of abstract law, the English judge has to search for it in the reasoning which has been applied to particular facts. Thus he is always reasoning inductively, and in the process he is said to be *bound* by the decisions of tribunals higher than his own. In the one theory antecedent decisions are helpful only as illustrations of a general proposition; in the other they are the very soil from which the general proposition must be mined. ✓

Different though these two theories seem to be in conception, in application they are not, as I shall attempt to show, as widely divergent as might be supposed. In one common case they are not, or ought not to be, really different in conception at all. When the English judge has to apply a *statute*—and this nowadays is a great part of his task—he is, it would seem, in exactly the same position as the Continental judge who has to apply a code. ✓ But here too—so deeply rooted is our principle of judicial analogy—our judges are governed by precedents of interpretation. ✓  
✓ An English statute is not very old before it ceases to be a dry generalization and is seen through the medium of a number of concrete examples. The result is often startlingly different from what the enactment would seem to have intended. ✓

There is much to be said for the view that, ideally, every judicial decision should be the direct deduction of rule to fact. Admit the unrestricted force of

example, it is urged, and you admit all the vagaries of infinite circumstances. Detached theorists like Hobbes, Bentham, and Austin have therefore not been slow to expose what they deem to be the fallacy on which our judicial reasoning rests. The system is certainly less than ideal; but in greater or less degree, whatever detached critics may say, practice shows it to be inseparable from any efficient administration of justice. The English are peculiar only in that they have admitted it more deliberately and in fuller measure than most other peoples.

It is often thought of as one of the characteristic points in which we have parted company with Roman tradition. Though this is true in the main, we must not suppose that the influence of precedent was entirely foreign to Roman Law. It was a commonplace with the Orators, and especially with Cicero, that the *res iudicata*, or *iudicatum*, was an integral part of the civil law, along with statutes, *senatusconsulta*, *iurisperitorum auctoritas*, magisterial edicts, custom, and equity.<sup>1</sup> In the unknown Auctor ad Herennium,<sup>2</sup> *iudicatum* appears in a slightly different list of sources—*natura*, *lex*, *consuetudo*, *iudicatum*, *aequum et bonum*, *pactum*—and is defined as ‘id de quo sententia lata est aut decretum interpositum’. We must not, however, understand *res iudicata* here as corresponding in any true sense with modern ‘precedent’. It means a decision given in a particular case and conclusive as between the parties to that case—a source of law only in the sense that it lays down the law finally in regard to a specific matter in issue.<sup>3</sup> It was not conceived as a permanent

2. Precedent in Roman Law.

The Orators.

<sup>1</sup> Top. vi. 28. Cf. *De Inv.* ii. 22, 67–8, where *aequitas* becomes *par*, and is classed with *pactum* and *iudicatum* as a branch of *customary law*.

<sup>2</sup> ii. 13, 19.

<sup>3</sup> In reference to the revocation of judgements and decrees once given, it is used by Cicero when he deprecates ‘iudiciorum perturbationes, rerum iudicatarum infirmationes’ (*De Leg. Agr.* ii. 4, 10; cf. *Verr.* v. 6. 12 and Mommsen, *Strafrecht*, 482), and when he pours scorn on the *ius Verrinum* of Verres: ‘alias revocabat eos inter quos

contribution to the general body of law, and its inclusion, like that of *pactum*, with sources like *lex*, *consuetudo*, and *aequum et bonum* is due to a confusion of thought. There is no suggestion, even in the Orators, of any strictly 'binding' principle; and the Auctor ad Herennium makes special reference to the disparities of decisions—'ut aliud alii iudici, aut praetori, aut consuli, aut tribuno plebis placitum est'—giving examples from actual cases. Much, then, he says, must depend on the personality and reputation of the judge, the circumstances of the time, and the number of decisions in the same sense. But while these reservations preclude the strict authority of precedent in the modern sense, they do not necessarily mean that individual decisions were quite without effect on subsequent practice.

Praetorian  
and  
juristic  
law.

✓ And indeed they could hardly be so in a system in which the praetorian edict played so vital a part. There could be no more conspicuous example than this of a whole body of law built up by judicial practice. ✓ The exact stages of its development are hidden from us: it differed, we need hardly say, in many essential respects from what we now understand by case-law; but it could not have attained its maturity except upon a recognized principle of judicial uniformity—though subject, unlike English precedents, to periodical recension. The praetor's duty of adhering to the principles announced in his edict, though it probably began as a mere convention, became statutory after the Lex Cornelia of 67 B. C.;<sup>1</sup> and it ensured to the public not only consistency during the magistrate's own term of office, but continuity in the

iam decreverat decretumque mutabat, alias inter aliquos contrarium sine ulla religione decernebat ac proximis paulo ante decreverat' (*Verr.* i. 46. 120). *Res iudicata* has this technical sense regularly in the Corpus Iuris: thus Ulpian's well-known 'res iudicata pro veritate accipitur' (D. 1. 5. 25), and cf. D. 42. 1. 1 and 44. 2, and the 'exceptio rei iudicatae' (Roby, *Roman Private Law*, ii. 388).

<sup>1</sup> Though this statute may have been of merely temporary effect: see Krüger, *Gesch. der Quellen des röm. Rechts*, 32, n. 7.

whole *ius honorarium*. It may well be that the very system of formulary procedure which eventually supplanted the archaic forms of action, grew up *de facto* by praetorian practice and passed, by confirmatory statutes, into *de jure* validity, with well-known and profound effect upon the civil law. Side by side with this elaborate system of judge-made law is an equally elaborate system of jurist-made law. Whereas the English law has been built up by the Bench, it has been well said that a great part of Roman Law was built up by the Bar.<sup>1</sup> Though this jurist-made law was couched in the form of opinions and succinct statements of principles, much if not most of it was based upon the facts of actual cases, and, first-regulated by the *ius respondendi* and the Law of Citations, and then finally embodied in Justinian's codification, was in essence a vast body of case-law made authoritative by the selection and revision of masters of the law. It goes without saying that the emperor's own *responsa* were nothing but summarized 'leading cases'; and these again were in no small measure 'built up by the Bar', being largely the product of the emperor's expert *consilium* of jurists.

It is interesting to speculate, but impossible to know, whether in the proceedings *in iudicio* under the formulary system, the *iudices* showed any tendency to imitate each other. It is improbable that they did so to any great extent, for they were laymen and therefore not so likely to be influenced by a professional tradition as a permanent Bench. Further, there is little ground for supposing that the *sententiae* (delivered orally) of the *iudices* were systematically recorded. It may well have been, however, that a consistent course of decision by *iudices* would influence the development of doctrines such as good faith in contracts, or degrees of *diligentia*, or the general standard of conduct to be expected from

<sup>1</sup> Maine, *Ancient Law*, 39. 'Bar' is, of course, only a loose analogy to the Roman jurists.



Force of  
imperial  
decisions.

a *bonus paterfamilias*. With the establishment of the procedure *extra ordinem* in the time of Diocletian, the position is radically changed. There is now a class of permanent professional judges and a system of Courts with copious records. It is reasonable to suppose that these professional lawyers tended to rely on the examples of colleagues and predecessors. At all events, we shall see that there is sufficient evidence of a marked uniformity in adjective if not in substantive law. It is tempting to conjecture, though it is not advanced as more than a conjecture, that Justinian's famous prohibition of precedent as a creative source of law is itself evidence of a tendency among judges to *stare decisis*. This would plainly be antagonistic to the central conception of imperial sovereignty, especially after the codification. If any decisions were to be binding authorities, they must be the decisions of the emperor himself, whether they concerned particular cases or the interpretation of enactments. The language of Justinian's constitution<sup>1</sup> is so emphatic that it certainly seems to be aimed at an existing practice which was considered dangerous.

'If the Emperor's majesty has heard and determined a suit, be it known to all judges whatsoever within our realm that such decision is stablished law (*legem*, i. e. with the force of statute) not only for that cause in which it was pronounced, but for all like causes. For what is higher or holier than the Emperor's majesty, and who is so puffed up as to think lightly of the royal judgement, when the jurists of the old law openly and most plainly lay down that constitutions issuing from imperial decree have the force of law? We further find it doubted in certain ancient statutes, whether imperial interpretation of statute ought to have the pre-eminence of sovereign pronouncement. This doubt we hold in derision for a barren nicety and one necessary to be amended. Therefore we decree that every interpretation of statutes rendered by the Emperor, whether in respect of petitions or of causes in action or in whatever other manner pronounced, shall be of indisputable authority (*ratam et*

<sup>1</sup> C. I. 14. 12.

*indubitatum haberi*). For if, at the present time, it is the prerogative of the Emperor alone to publish statutes, so the interpretation thereof should pertain to his dignity alone. Why otherwise, in special cases stated by magistrates (*ex suggestionibus procerum*), when the judge is in doubt upon a point arising at trial and deems the decision to be beyond his competence, is the matter referred to us? Why are difficulties in the interpretation of statutes submitted by judges to our own proper person (*aures accipiunt nostrae*) if interpretation proceeds not from our own proper judgement? . . . An end now made to these vain doubts, so shall the Emperor be justly esteemed not only as the sole author but also as the sole interpreter of statutes. But nothing herein contained shall derogate from the status of the jurists of the old law, for they too, by favour of the Emperor's majesty, enjoy this privilege.'

It is merely the corollary to this vigorous assertion of monopoly that authority is denied to any decisions other than those of the Princeps; and it would seem to be more than a coincidence that this corollary was enacted on the very same day as the constitution last quoted, and addressed to the same person: <sup>1</sup>

'No judge or arbitrator is to consider himself bound by juristic opinions (*consultationes*) which he considers wrong: still less by the decisions of learned prefects or other judges. For if an erroneous decision has been given, it ought not to be allowed to spread and so to corrupt the judgement of other magistrates. Decisions should be based on laws, not on precedents. (*Non exemplis, sed legibus iudicandum est.*) This rule holds good even if the opinions relied upon are those of the most exalted prefecture or the highest magistracy of any kind. Our will is that all our judges adhere to the true meaning of laws and follow the path of justice.'

This we may take to have been the final 'official' Roman view of precedent, whatever the practice may have been; and it is therefore not surprising that Cicero's inclusion of *res iudicatae* among the sources of law does not reappear in the later jurists.<sup>2</sup> One

<sup>1</sup> C. 7. 45. 13.

<sup>2</sup> *Res iudicata* acquired the more technical meaning which it now

passage only in the *Corpus Iuris* seems to conflict directly with Justinian's principle, and has been the centre of much controversy. Callistratus, in D. 1. 3. 38, says: 'Nam imperator noster Severus rescripsit in ambiguitatibus quae ex legibus proficiscuntur consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis optinere debere.' Even this statement is confined to the interpretation of *statute*; and if it be a correct statement of a rule laid down by Septimius Severus (of which nothing else is known), it is so directly contrary to Justinian's constitution quoted above, that it must be considered as repealed, if it ever existed. Indeed, it is not impossible that Justinian had it specially in contemplation in enacting his constitution, and that he indirectly refers to it in the phrase 'in veteribus legibus invenimus dubitatum'.<sup>1</sup> If this be so, the extract from Callistratus should not have found a place in the Digest; but such inconsistencies are not unknown in the *Corpus Iuris*. In any case, Callistratus's dictum cannot be considered as representative of Roman theory.

*Mos iudiciorum.* But if the full force of precedents was not admitted under the Empire, professional practice had an important influence in the development of legal forms. ✓ 'The custom of the court' (*mos iudiciorum*) is often referred to as a decisive factor in the form of the plaintiff's remedy. Thus a creditor on a pact with stipulation is not to proceed to execution *citra sollemnem ordinem*, but must obtain his remedy by judgement *more iudiciorum*.<sup>2</sup> The importance of this common phrase should not be exaggerated. It occurs only in imperial constitutions and seems to refer chiefly to points of procedure.<sup>3</sup> When, for example, the plaintiff has in English law—i. e. judgement operating as a bar to any further proceedings *in the same matter*: thus, in its context, Ulpian's well-known *res iudicata pro veritate accipitur* (D. 1. 5. 25) has no relevance to precedent, though sometimes cited in that connexion. Cf. D. 42. 1. 1 and D. 44. 2, *passim*.

<sup>2</sup> C. 2. 3. 14.

<sup>1</sup> C. 1. 14. 12. 2.

<sup>3</sup> Brie, *op. cit.* 52 ff.

is directed by a constitution of Antoninus: 'If you claim that you are entitled to the possession of certain things, you must recover possession *more iudiciorum*, for the onus of proof is not on the defendant, and the dominium remains with him *te in probatione cessante*':<sup>1</sup> the reference is clearly limited to the procedural method of proof. At other times the expression seems to be little more than one of those catchwords so common in legal phraseology, and might be translated as 'in due form', 'by due process of law', or 'by the appropriate form of action'. Thus in one case<sup>2</sup> we have the well-known rule asserted that the principal is not to be prejudiced by the agent's excess of his mandate. But suppose the agent, though invested with full discretion, has yet exceeded his authority to the extent of becoming involved in litigation. Ought the judgement in the action to be rescinded? The answer is that the judgement must stand, because the principal can bring action against the agent *more iudiciorum* if the agent has acted fraudulently. This seems equivalent only to saying that the principal has an ordinary *actio mandati*, and the known forms of action in such circumstances must be adhered to. Or again, suppose slaves have been bought in the names of yourself and your brother, to whom you have now succeeded as heir, the fact (expressly mentioned in the instrument of sale) that the purchase-money was paid by your mother, will not prevent you from suing *more iudiciorum*<sup>3</sup>—i. e. by whatever form of action fits the circumstances: perhaps an *actio ex empto*, perhaps an *actio quanti minoris* or *redhibitoria*, and so forth. These and similar constitutions<sup>4</sup> seem only to inform the plaintiff that he is not debarred from his remedy in the ordinary course of law, though they say nothing to the merits of the action itself. They may have been preliminary opinions taken by a prospective litigant to

<sup>1</sup> C. 4. 19. 2.<sup>2</sup> C. 2. 12. 10.<sup>3</sup> C. 4. 50. 3.<sup>4</sup> C. 5. 62. 15; 7. 21. 4; 9. 2. 4.

ascertain his best method of procedure, or possibly decisions, by way of appeal, on procedural objections raised in court to the plaintiff's claim. Sometimes the phrase is *more solito*, and it does not seem to differ from the meaning already suggested.<sup>1</sup> But in two cases there are hints that it may refer to some *local* rule of practice. A litigant is told<sup>2</sup> that she may proceed *more solito*, if she thinks she has a good cause of action, against one who has built so as to obstruct her lights; and Girard sees here a possible reference to local building regulations.<sup>3</sup> A clearer suggestion of purely provincial practice is contained in a passage<sup>4</sup> which lays down that a husband must proceed under the *Lex Iulia de adulteriis* for the adultery of his wife *more solito* in the province where the offence was committed. Unless some local peculiarity of procedure is indicated, there seems to be little purpose in the regulation.<sup>5</sup> Other evidence is not wanting that provincial customs prescribed rules of form which were well known and observed. In one case a local procedural rule is actually enjoined upon the magistrate, and he is told that in summoning witnesses he must have regard to the custom of the province in that respect.<sup>6</sup>

Provincial Courts cannot have been peculiar in this matter. Any Court must develop, as part of its routine, working rules of procedure not covered by any statute or code. It was not inconsistent with imperial authority

<sup>1</sup> C. 7. 73. 3; 9. 35. 3.

<sup>2</sup> C. 3. 34. 1.

<sup>3</sup> *Manuel* (5th ed.), 360, n. 6, in support of the theory that the controverted 'ius altius tollendi' was an exemption from local building restrictions. But it seems unsafe to lay too much stress on the phrase. The sting of the rescript lies in its tail, which insists that prescriptive possession must be 'nec vi nec clam nec precario'.

<sup>4</sup> C. 9. 9. 12.

<sup>5</sup> e. g., there would be nothing surprising or irregular in a particular jurisdiction requiring a certain form of *accusatio* with specified particulars in a statutory action of this kind.

<sup>6</sup> D. 22. 5. 3. 6: 'sed et divi fratres rescripserunt: "Quod ad testes evocandos pertinet, diligentiae iudicis est explorare, quae consuetudo in ea provincia, in quam iudicat, fuerit".'

that this kind of precedent should be both permitted and encouraged. Thus Justinian specifically ordains that the form of oaths, in all cases where procedure by oath is appropriate, shall be determined by the *observatio iudicialis*.<sup>1</sup> And although the admission of precedent hardly travelled beyond the sphere of adjective law, it constituted a by no means unimportant element in Roman jurisprudence; for an established rule of adjective law, operating as it must on the remedies available to litigants, cannot fail to affect substantive principles. Of this we have a striking example in the Institutes,<sup>2</sup> where, after stating detailed rules for the giving of securities for litigation, Justinian observes: 'Quae omnia apertius et perfectissime a cottidiano iudiciorum usu in ipsis rerum documentis apparent.' As he has already told us that recent practice has developed new forms of securities—'alium (modum) novitas per usum amplexa est'—it seems plain that these important rules of litigation sprang from procedural precedent, and that this origin was recognized as unexceptionable.

We may, then, conclude that the later Roman jurisprudence, while unable to exclude altogether the operation of judge-made rules, admitted it only as an indirect and greatly restricted influence upon the substantive law. Judge-made principles were not placed even as high as custom, for the *mos iudiciorum* is nowhere mentioned as a department of *consuetudo*, except in the passage of Callistratus which has been mentioned.

Justinian's 'non exemplis sed legibus iudicandum est' might be taken as the epitome of the deductive principle of judicial reasoning, widely accepted at the present day on the Continent. We may take French

3. Precedent in modern Continental law.

<sup>1</sup> C. 4. 1. 12. 5. D. 4. 1. 7. pr. seems to give little warrant for the view that the practice of pronouncing judgement by default against an absent defendant sprang solely from judicial practice. *More* here seems to mean only 'as usual'.

<sup>2</sup> iv. 11. 6.

law as characteristic,<sup>1</sup> and it may not be unprofitable to compare briefly the theory and practice of the French Courts in this respect.<sup>2</sup>

Extra-  
judicial  
doctrine.

An Englishman approaching the study of French law is at once struck by the seeming paradox that while the codified law is insisted on as supreme, an extremely important part is played by extra-judicial and extra-legislative doctrine. The great commentaries on the Civil Code are scarcely less authoritative than the Code itself; in one sense they are more authoritative, for without them the bare provisions of the Code are meaningless to the practitioner. He turns to a great work like that of Aubry and Rau as to the true Pandects of his law, for here he will find not only the provisions of the law itself, but the historical accretions which are inseparable from it. So indispensable is this great body of learning (*la doctrine*) that one school of thought regards it as the most essentially creative element in law, and pleads for a *libre recherche scientifique* which shall constantly adapt formulated rules to changing social needs. It is claimed that the formulated rule, as originally framed, soon detaches itself completely from the will and intention of its creator and assumes a different life and character in the hands of the interpreter. Without necessarily conceding so wide, and,

<sup>1</sup> See Planiol, *Traité Élémentaire de Droit Civil*, i. 45 ff.; Colin et Capitant, *Cours Élémentaire de Droit Civil Français* (4th ed.), i. 29 ff.

<sup>2</sup> On the German view of *Praxis*, *Gerichtsgebrauch*, and *Juristenrecht* as sources of law, see Gierke, *DPR.* i. 176 ff., and J. C. Gray in *H. L. R.* ix. 27, where Stobbe, *DPR.*, is cited as the characteristic view: 'Practice is in itself not a source of law; a court can depart from its former practice and no court is bound to the practice of another. Departure from the practice hitherto observed is not only permitted but required, if there are better reasons for another treatment of the question of law.' Gierke (*op. cit.* 179 and n. 8) ranges himself with a numerous school in considering it as a subordinate part of customary law, with the same force as custom. On the binding force attributed in English law to rules of professional practice, see *In re Hodgson* (1885), 31 Ch.D. 177, and *R. v. Tate*, [1908] 2 K.B. 680.

as the opposing school holds, so dangerous a function to doctrine, every French lawyer admits its vital importance in the legal system.

For without extra-judicial doctrine, there would be no doctrine at all. The Code itself insists that the Judge confine himself to the simple deduction of rule to case. Art. 5 expressly inhibits magistrates from any pronouncement 'par voie de disposition générale et réglementaire sur les causes qui leur sont soumises'. *Disposition générale* is not the business of the Judge, but of the legislative sovereign. In practice, as might be expected, this artificial limitation of the Judge's office becomes difficult. The *chose jugée* proves obstinate, the more so because it is now recorded in abundance and in easily accessible forms. The numerous and extensive collections of reports are now almost as much part of the French as of the English lawyer's professional equipment.<sup>1</sup> Nobody can hope to understand the workings of French law without constant reference to standard collections of decisions like those of Dalloz and Sirey. But here again we find a fusion, strange to the English lawyer, of judicial and extra-judicial doctrine. In accordance with Art. 5 above-mentioned, the judgement takes a form singularly jejune to one who is accustomed to the full, reasoned judgements of English Courts. The facts are given in bare outline, and the judgement states little else than the main facts and the statutory provisions upon which the decision is based. It is left to the reader to fill up many gaps in the reasoning which brought the facts within those provisions—not always an easy task. But, if the case is important, a reasoned exposition of the judgement, with abundant references to other decisions, is often added. This gloss, however, comes not from the Court itself, but from some accredited jurisconsult—often a distinguished practitioner, often an academic teacher

<sup>1</sup> The chief series of reports and commentaries are mentioned in Colin and Capitant, *op. cit.* i. 34, n. 2.



or learned writer. The total effect of this union of decision and interpretation is not unlike an English report. There is, however, the great difference that all English judgements are *motivés*, whereas it is only a small minority of French decisions which have the advantage of a learned commentary.

Effect of  
precedents  
in French  
law.

This accumulation of precedents has had a visible and growing effect in modern French jurisprudence, as is well shown by the fact that a whole school of lawyers have earned for themselves the title of *arrêtistes*. It is no secret that a strong and uniform line of decisions may modify or even completely reverse a rule of legislation, and that far-reaching principles may establish themselves quite independently of any enactment in that behalf. Thus Article 1554 of the Civil Code forbids<sup>1</sup> the alienation of immovable property forming part of a dowry. Nothing is said about movable property; but the principle has been extended in that sense by a series of decisions now recognized as embodying a rule of law. Articles 1119 and 1121 forbid the practice of entering into a stipulation on behalf of another, except under certain narrow conditions. This rule was found extremely inconvenient, especially in connexion with life insurance, a transaction unknown to the framers of the Code. Throughout the nineteenth century, a long series of decisions have gradually whittled away the rule, until it has become virtually abrogated and at the present time the *stipulation pour autrui* is legitimate and frequent.

General  
theory of  
precedents  
in French  
law.

Yet modern French theory is far from conceding any absolute authority to decided cases. Again and again it is insisted that every Court must be at liberty to change its mind and therefore need not repeat its own previous decision: still less need it follow the decisions of other Courts, of whatever degree. As against the examples I have given, it would be easy to find many others of wide discrepancies. Conflicting

<sup>1</sup> With certain exceptions mentioned in succeeding articles.

decisions have caused no small embarrassment and in particular the absence of any definite hierarchy of authority has been found inconvenient. For more than a century France has been endeavouring to establish some final authority to ensure uniformity of doctrine; and the hesitating steps by which it has arrived at the present arrangement show how reluctant it is to derogate from the complete independence of its inferior tribunals. The final appellate Court on the civil and criminal (as opposed to the administrative) side of French jurisdiction is the Cour de Cassation, and an elaborate system of preliminary checks ensures that it shall consider only appeals which raise a substantial point of law of public importance. Its judgements are therefore the most authoritative possible, but they are in danger of being so much wasted breath if the independence of the lower Courts is carried to an extreme. The position becomes the more anomalous in view of the great importance which French law attaches to the right of appeal in all but the most trifling causes. The first attempt, in 1790, to solve the difficulty, vested the final right of interpretation in the legislature. If the lower Court persisted in its opinion despite *two* decisions in appeal to the contrary, it was for the legislature to state the true rule of law. The inconvenience of this expedient, and its incompatibility with the principle of the separation of powers, need hardly be pointed out. The second experiment, in 1807, was even more clumsy and, in violation of traditional French doctrine, gravely confused the judicial with the administrative power. If, after one decision, the same matter came before the Court of Cassation in the same form, the Court, before deciding again in the same sense, could apply to the Government for a ruling. The Government in its turn took the advice of the Conseil d'État (the final appellate Court in purely *administrative* suits), and the only practical effect was that the responsibility of final decision was shifted from

one Court to another and from one constitutional sphere to another. A further and even more unsatisfactory attempt was made in 1828 to divide the responsibility between the Court of Cassation and the legislature; and it was not till 1837 that the present system was finally established and authority was fully vested in the ultimate Court itself. As matters now stand, if the ordinary Court of Cassation (i. e. one *chambre* or bench of that Court) has allowed an appeal, and the lower Court to which the case is remitted refuses to accept the ruling laid down, then if the same case goes a second time to appeal, an extraordinary or full Court of Cassation (*toutes chambres réunies*) hears the case, and its decision must be accepted by the inferior Court.

Even this arrangement seems, to English eyes, strangely cumbrous. It must be remembered that *cassation* is not the same thing as reversal of judgement in the English sense. When the Court of Cassation allows an appeal, it does not enter final judgement for the appellant, but sends the case back, not, it is true, to the same Court which originally tried the case, but to another Court of equal jurisdiction. It grants what we should call a new trial. At this second trial, the Judge may adhere, despite the Court of Cassation, to the view originally taken by the Court of first instance. It is improbable that he will do so, since the Court of Cassation is likely to reaffirm its previous decision. But a sensitive legal conscience may make him desire a ruling from the Court of Cassation *toutes chambres réunies*. Or he may be merely obstinate, in which case the parties to the suit, exposed to further litigation, become the *corpus vile* of his obstinacy. The procedure is extraordinarily circuitous, for if the full Court of Cassation is to be regarded as an appellate Court from the ordinary Court of Cassation (*chambre civile*), there seems little reason why the appeal should not lie direct, without the intervening stage of a second trial at Bar. However this may be, the final decision of the Court

of Cassation is authoritative *only for the particular case before it*: the system outlined above aims only at preventing multiplicity of actions *on the same cause*. There is no compulsion on lower Courts to follow the ruling even of the full Court of Cassation (*toutes chambres réunies*) *in pari materia*. Nor is the Court of Cassation bound by its own previous decisions. But in practice these decisions of the highest tribunal do produce a real uniformity in the law. Not only is respect naturally and genuinely paid to so eminent a Court, but inferior Judges are hardly likely to give decisions with the certainty that they will be reversed on appeal. Thus, in the words of M. Planiol, 'we may see the growth of unmistakable currents of jurisprudence which cannot be stemmed or diverted. We may then say that judicial doctrine (*la jurisprudence*) is *fixed* or *complete* (*faite*). . . . Changes therein are dangerous by reason of their retro-active effect on private interests and contracts.'<sup>1</sup>

## II. GROWTH OF PRECEDENT IN ENGLISH LAW

The growth of the authority of precedents in our own law is a study full of interest. Though it is difficult to determine precise stages of evolution, a gradual building up of tradition is discernible. It has been conjectured that reports existed 'digested in years and terms as ancient as the time of King William the Conqueror', but this speculation rests upon no authority. Its author,<sup>2</sup> however, calls attention to an interesting

<sup>1</sup> *Op. cit.*, para. 124. Cf. Génv, *Méthode d'Interprétation*, 430 ff. The jurisprudence of the Conseil d'État has been built up almost entirely by precedent: see Duguit, in the works referred to *post*, p. 336, n. 2, *passim*, and Berthélemy, *Traité Élémentaire de Droit Administratif*.

<sup>2</sup> Sir John Davies, Introduction to his Reports (1604-12). See Horwood, Preface to Y. B. 30 & 31 Ed. I (R. S.), xvi. Blackstone (1 *Comm.* 69) quotes Selden (*Review of Tith.*, c. 8) as saying that the 'praetitorum memoria eventorum' was reckoned, *even so early as the Conquest*, as one of the chief qualifications of those who were held to be 'legibus patriae optime instituti'.

sidelight from literature on legal methods in the fifteenth century. When Chaucer says of his Serjeant:

In termés had he case and domés all,  
That from the time of King William was fall,

he at least indicates that a knowledge of decided cases was the mark of a learned lawyer in his own day; though from what source such knowledge was derived we cannot tell. Citation of cases practically does not exist in our earliest institutional writers. In Glanvil one decision is referred to, in Fleta one, in Britton none, in Littleton eleven.<sup>1</sup> With Bracton the case is very different, and it is from him that our evidence begins to take shape. He lays down a general principle, following on Roman lines, but with an interesting addition concerning the English judicature.

‘If any new and unwonted circumstances, hitherto unprecedented in the realm, shall arise, then if anything analogous has happened before, let the case be adjudged in like manner (*si tamen similia evenerint per simile iudicentur*), since it is a good opportunity for proceeding *a similibus ad similia*. But if nothing of the same kind has ever happened before, then let such matters be referred to the Magna Curia that they be there determined by deliberation of the Curia. There be some who are so confident of their knowledge of every part of the law, that they are unwilling to seek the advice of any body else; but in such a case it would be more meet and prudent of them to take advice than to come to a rash decision, since it is inexpedient to be in doubt on particular points of law.’<sup>2</sup>

It is consistent with this principle that his own treatise contains some 500 references to decided cases. Not all, but most, of these may be attributed to the author himself—enough certainly to show that he resorted frequently to decisions, taken from court rolls and probably often from personal recollection, as

<sup>1</sup> J. C. Gray, ‘Judicial Precedents’, *H. L. R.* ix. 27.

<sup>2</sup> *De Leg.*, f. 1b; Woodbine, ii. 21. Cf. D. i. 3. 12: ‘Non possunt omnes articuli singillatim aut legibus aut senatus consultis comprehendere: sed cum in aliqua causa sententia eorum manifesta est, is qui iurisdictioni praeest ad similia procedere atque ita ius dicere debet.’

part of his ordinary method of legal exposition. It may be that Bracton set the fashion: it may be that he was merely following what had already become the fashion. There is respectable evidence that at least as early as the last quarter of the thirteenth century, the practice of citation was frequent in the legal profession. It was well known to one of the foremost Judges of this period, Ralph de Hengham, and Professor Woodbine has adduced interesting evidence of like effect from manuscript tracts of about the same date.<sup>1</sup> But most striking of all is the evidence furnished by the celebrated *Note Book* which Bracton certainly used, if he did not compile it with his own hand. No lawyer would have been at the pains of making this collection of some 2,000 decided cases, or having it made for him, unless he laid great store by it as a 'practice book'.<sup>2</sup> Its utility can be the better appreciated when we remember how great a part pleading played in the medieval lawyer's business, and how important the practice of the Courts must have been in this respect. Bracton's law, as Maitland has emphasized, was therefore 'case law' in a very real sense, and 'in dealing with concrete matters he appeals not to Azo, nor to Ulpian, nor again to Reason or Nature, but to this and that case adjudged by Martin Pateshull or William Raleigh'.<sup>3</sup> More than this, some of Bracton's cases themselves carry us back a stage farther and show us

<sup>1</sup> Bracton, *De Leg.* i. 366 f. Judges are commonly mentioned by name as having laid down certain rules. Some of the cases collected by Professor Woodbine are of remarkable interest: see his note to p. 367. He points out that after Edward I it became the fashion to refer to clauses of statutes rather than to Judges and cases. On Hengham, see further Vinogradoff, 'Ralph of Hengham as Chief Justice of the Common Pleas', in *Essays in Mediaeval History presented to T. F. Tout* (ed. Little and Powicke).

<sup>2</sup> Though doubtless his chief object was the preparation of material for his treatise.

<sup>3</sup> *Bracton's Note Book*, i. 11. But, in view of later evidence, Maitland probably exaggerated Bracton's singularity in this respect.

that Judges were seeking the guidance of precedent early in the thirteenth century. Thus in a case of 1234 in the Eyre of Essex<sup>1</sup> we find the Judges asking 'si umquam tale factum fuit iudicium in praefata curia, et quod ostendunt exemplum' and (so it is to be inferred) refusing to lay down a new rule in the absence of any such *exemplum*. By 1237 that very British (and very human) argument, 'I never heard of such a thing!', has commended itself to judicial dialectic, and we seem to see the Judges holding up their hands in horror when we read 'omnes dixerunt quod nunquam viderunt talem casum'.<sup>2</sup> In 1292 the settlement executed by Thomas of Weyland raised novel questions as to the creation of remainders and conditions in the devolution of land; the case was considered so important that it was argued before all the Judges, the Barons of the Exchequer, the Council, and Parliament; and Parliament ordered the rolls to be searched for a precedent bearing on the case in hand.<sup>3</sup>

The Year  
Books.

With the beginning of the Year Books we can form some notion of the practical workings of precedents in the Courts. Decisions are cited often enough to show that both Bench and Bar consider them a relevant part of argument. At the beginning of the fourteenth century, counsel solemnly reminds the Court that 'the judgement to be by you now given will be hereafter an authority in every *quare non admisit* in England'.<sup>4</sup> In proportion to the total number of cases contained in the Year Books, the amount of citation is small, though by no means inconsiderable; and it is not improbable that the recorded instances represent only a very small proportion of the citations actually employed in Court, since most of the Year Book reports are highly com-

<sup>1</sup> *Bracton's Note Book*, ii. 641, Case 834.

<sup>2</sup> *Ibid.* iii. 242, Case 1227.

<sup>3</sup> Rot. Parl. i. 66 (19 Ed. I, no. 1); Holdsworth, *H. E. L.* iii. 104; *Sources and Literature of English Law*, 87.

<sup>4</sup> Y. B. 32 Ed. I (R. S.), 32.

pressed, and give us only fragments of the case as it was presented to the Court.<sup>1</sup>

The precedents are sometimes cited by name in the course of counsel's argument, e. g. 'witness the plea of Richard the Fowler, where the *quid iuris clamat* was brought in a similar case', &c.;<sup>2</sup> or 'witness the Bishop of Hereford who made avowry upon Roger Mortimer', &c.;<sup>3</sup> or 'David of Fleetwick's case was just the same' (*Davyd de Flepwyk fut en mesme le cas*).<sup>4</sup> Sometimes the form of the reference suggests that the precedent cited was a 'leading case' well known to the profession—thus *le play bastard vous salve*, 'the Bastard's Case saves you' (followed by a short *précis* of the case).<sup>5</sup> A common formula is 'we have seen before now', or 'we saw in the time of such-and-such a judge' (*nous avons vew, nous veymes*), followed by a summary of the case, which is sometimes given by name.<sup>6</sup>

The fascinating game of 'distinguishing' is already popular. *Non est simile* seems to have been the most effective retort to any citation by one's learned friend.

'*Toudeby*. Moreover, we have seen that aid was granted in a case like this between Tybaud of Verdone, &c.

'*Herle*. *Non est simile*. For in the case of Tybaud the tene-ments were given in frank-marriage, &c.'

The Bench is prompt to find joints in learned coun-

<sup>1</sup> On the other hand, the reporters occasionally add a note citing parallel cases: see *Anon.*, Y. B. 6 Ed. II (S. S. xiv (1)), 120; and note to *Abbot of St. Nicholas v. Prior of Nocton*, Y. B. 7 Ed. II (S. S. xvi), 120, 122.

<sup>2</sup> *Waleys v. Eywile*, Y. B. 6 Ed. II (S. S. xiv (1)), 81, 82.

<sup>3</sup> *Durant v. Cogan*, Y. B. 4 Ed. II (S. S. iv), 110, 111.

<sup>4</sup> *Tremur v. Giffard*, Y. B. 6 Ed. II (S. S. xiii), 211, 212.

<sup>5</sup> *Anon.*, Y. B. 2 Ed. II (S. S. i), 130.

<sup>6</sup> *Anon.*, Y. B. 2 Ed. II (S. S. i), 70, 72, per *Toudeby* (case not named); *Archbishop of Canterbury v. Percy*, Y. B. 3 Ed. II (S. S. iii), 31, 34, per *Scrope*, citing *Robert of Tattershall v. Prior of Wymondham*; *Beneyt v. Lodewyk*, *ibid.* 46, per *Passeley*: 'Sir, in the time of Sir John of Metingham we saw here that a sealed tally was denied.'

<sup>7</sup> *Anon.*, Y. B. 6 Ed. II (S. S. xiii), 189, 190.



sel's harness. Sometimes a judge will distinguish a cited case in point of law,<sup>1</sup> sometimes 'on the facts'.<sup>2</sup> 'Not similar' (*n'est pas semblable*) is again the appropriate repartee.<sup>3</sup> Precedents seem to come more often from the Bench than from the Bar. The reporter will tell us that the Judge cited (*allega* <sup>4</sup>) a certain assize of novel disseisin which seemed to be in point; counsel perhaps replies with another case, giving its name: 'not similar', answers the Judge, for such-and-such reasons.<sup>5</sup> The following is a characteristic interchange:

'*Stanton* J. That the writ [of account] lies against strangers is shown by the case of John of Studley and the Bishop of Winchester.

'*Herle*. Yes, and I could find you others [against whom it has been brought].

'*Hunt*. No wonder! There [the bishop] assumed the wardship, saying that [Studley] held of him by a service that [gives wardship to the lord], and this was found to be untrue. Here, however, we are not guardians but the farmer of J., who leased to us these tenements for a hundred shillings, which naturally [must be regarded as] the issues of the land, and they came to his hand. So he, it seems, is the person to render the account.'<sup>6</sup>

In one case the Chief Justice is unkind enough to confront counsel with his own argument in a previous case, of which, as it happens, we have a report in the same Year Book.<sup>7</sup>

Except in rare cases where the precedent seems to be

<sup>1</sup> *De la More v. Thwing*, Y. B. 2 Ed. II (S. S. i), 176, 178, per Scrope J.

<sup>2</sup> *Whitacre v. Marmion*, Y. B. 7 Ed. II (S. S. xvi), 126, 127: *Inge* J. (to Toudeby): 'You are not in the circumstances of William the Butler, for he was within age, etc.'

<sup>3</sup> *Anon.*, Y. B. 4 Ed. II (S. S. iv), 164; *Warthill v. Selby*, Y. B. 7 Ed. II (S. S. xvi), 110, 112.

<sup>4</sup> Cf. *Abbot of Barlings v. Paynel*, Y. B. 7 Ed. II (S. S. xvi), 162, 164.

<sup>5</sup> *Warthill v. Selby*, *ubi sup.*, argument between *Inge* J. and *Denham*.

<sup>6</sup> *Anon.*, Y. B. 2 Ed. II (S. S. i), 109.

<sup>7</sup> *Bereford C.J.* and *Herle* in *Walsham v. W.*, Y. B. 8 Ed. II (S. S. xviii), 52, 57.

notorious, the impression conveyed is that counsel are drawing on their own memories. Thus 'Huntingdon said that he saw a fine levied before Sir Thomas of Weyland between two parties where it was declared by the fine that one of them should have the half towards the south and the other the half towards the north. And this seemed strange to Bereford (C.J.).'<sup>1</sup> Probably owing to the reporters' excessive concision, the references are sometimes very vague; but they were doubtless mentioned with fuller detail in court, for opposing counsel seem to recognize the circumstances at once. When, for example, Scrope makes a citation in such general terms as 'a wife that sought to recover her inheritance was rebutted, &c.', Denham answers, 'That case is still undecided' (*C'est unquore pendant*).<sup>2</sup> Sometimes when counsel is relying on memory, the scepticism of the Bench is candid to the point of brutality. We find Stanton J. in 1311 using an expression which may be regarded as the medieval equivalent of 'If that is the law of England, I will eat my hat!' He asks Miggeley:

'Where have you seen a guardian vouch on a writ of dower?  
Miggeley. Sir, in Trinity term last past, and of that I vouch the record.

Stanton J. If you find it, I will give you my hat (*jeo vous dorra mon chaperon*).'<sup>3</sup>

Miggeley's words remind us that ultimately the only authority cognizable by the Court was the record of the case. Nevertheless, a great deal must have turned on the readiness of counsel in adducing precedents within their own experience.

This is even more true of the Bench. One cannot help being struck by the particularity with which Judges recall the circumstances of preceding cases, many of them of no very recent date. In 1310 Stan-

<sup>1</sup> *Anon.*, Y. B. 2 Ed. II (S. S. ii), 5, 6.

<sup>2</sup> *Bordesdene v. B.*, Y. B. 7 Ed. II (S. S. xv), 190.

<sup>3</sup> *Anon.*, Y. B. 4 Ed. II (S. S. vi), 168.

ton J. is relying confidently on a case decided by Sir John of Mettingham,<sup>1</sup> who was appointed to the King's Bench in 1276 and died in 1301, so that Stanton must be carrying his memory back some distance. Inge J. in 1314 not only cites an opinion of Sir Ralph of Hengham, which must have been at least ten years old and probably much older, but recalls a remark which Hengham made to Bereford.<sup>2</sup> But most conspicuous in this respect is Bereford himself. In the Year Books of Edward II, his is the dominating personality on the Bench. He is a Chief Justice in no mere titular sense. Time and again he supports his opinions, in the most emphatic manner, with precedents. 'I have seen a case of' is his frequent expression, or 'do you not remember the case of?', &c.,<sup>3</sup> and he unmistakably gives counsel to understand that unless they can 'distinguish' his precedent, they cannot succeed.<sup>4</sup> Occasionally he recalls not only decisions, but arguments before the court: 'and once I saw here a great master (*un graunt mestre*) wanting to aver in a writ of entry', &c.<sup>5</sup> His rejection of counsel's citations is sometimes very summary, not to say impatient. His only reply to Scrope's adduction of a named case is, 'Never will you see such an avowry received'.<sup>6</sup> His memory, if it be solely memory, is very tenacious. In 1312 he cites a decision of Sir John Lovetot, who was raised to the Common Pleas in 1275 and removed therefrom in 1289.<sup>7</sup> His statement of the facts of a case is usually clear and concise; <sup>8</sup> and indeed

<sup>1</sup> *Kembeare v. K.*, Y. B. 4 Ed. II (S. S. iv), 153, 154.

<sup>2</sup> *Kemston v. Ralph*, Y. B. 8 Ed. II (S. S. xviii), 24, 25.

<sup>3</sup> See Maitland, Y. B. 3 Ed. II (S. S. iii), Introd. x.

<sup>4</sup> See, e. g., *Halstede v. Gravashale*, Y. B. 2 & 3 Ed. II (S. S. ii), 53, 54; *Bernake v. Montalt*, Y. B. 3 Ed. II (S. S. iii), 60.

<sup>5</sup> *Basset v. Driby*, Y. B. 6 Ed. II (S. S. xv), 46, 47; *Walsham v. W.*, Y. B. 8 Ed. II (S. S. xviii), 52, 57.

<sup>6</sup> *Archbishop of Canterbury v. Percy*, Y. B. 3 Ed. II (S. S. iii), 31, 34.

<sup>7</sup> *Anon.*, Y. B. 6 Ed. II (S. S. xiii), 43, 44.

<sup>8</sup> See, e. g., a model *précis* in *Walsham v. W.*, Y. B. 8 Ed. II (S. S. xviii), 52, 56, in the form of a note.

some of his *memorabilia* are as vivacious as they are instructive. The following is typical of his manner of narration, and is interesting in showing that what Bereford was doing with precedents, Hengham had done before him.

‘In the time of the late King Edward a writ issued from the Chancery to the sheriff of Northumberland to summon Isabel Countess of Albemarle to be at the next parliament to answer the King “touching what should be objected against her”. The lady came to the parliament, and the King himself took his seat in the parliament. And then she was arraigned by a justice of full thirty articles. The lady, by her serjeant, prayed judgement of the writ, since the writ mentioned no certain article, and she was arraigned of divers articles. And there were two justices who were ready to uphold the writ. Then said Sir Ralph Hengham to one of them: “Would you make such a judgement here as you made at the gaol delivery at C. when a receiver was hanged, and the principal [criminal] was afterwards acquitted before you yourself?” And to the other justice he said: “A man outlawed was hanged before you at N., and afterwards the King of his great grace granted that man’s heritage to his heir because such judgements were not according to the law of the land.” And then Hengham said: “The law wills that no one be taken by surprise in the King’s court. But, if you had your way, this lady would answer in court for what she has not been warned to answer by writ. Therefore she shall be warned by writ of the articles of which she is to answer, and this is the law of the land.” Then arose the King, who was very wise, and said: “I have nothing to do with your disputations, but, God’s blood! you shall give me a good writ before you arise hence.” So say I here.’<sup>1</sup>

The citations of Bereford, as well as other judges of this period, are so circumstantial, when we get anything like a full report of them, that one is tempted to wonder whether they were based solely on extemporaneous

<sup>1</sup> *Goldington v. Bassingburn*, Y. B. 3 Ed. II (S. S. iii), 194, 196; also reported in Y. B. 5 Ed. II (S. S. xi), 42, 44; see Bolland, *Introd.* to this vol., xl. Cf. Bereford’s graphic citations in *Toftes v. Thorpe*, Y. B. 3 Ed. II (S. S. iii), 71, 72, and *Scaldeford v. Abbot of Vaudey*, Y. B. 3 & 4 Ed. II (S. S. iv), 30, 33.

recollection. We know from modern experience that Judges often have extraordinarily long and vivid memories of case-law; but if Bracton compiled a case-book, it is not unreasonable to suppose that other Judges did the same. Certainly some of the judicial dicta have an air of being based on some kind of private jottings. In that matter, however, we can but conjecture; but I suspect we may see here the beginnings of those 'private reports' of which the Year Books, according to the prevailing modern view, are themselves examples, and which were common among Judges of a later period.

There does not seem to have been any rule for the antiquity of precedents. Occasionally a decision is referred to as 'an ancient case',<sup>1</sup> but we have no means of knowing how ancient. Sometimes we know from other sources that the case referred to was quite recent,<sup>2</sup> and once or twice we have references to cases reported in the Year Books themselves.<sup>3</sup> In one case, already referred to, counsel in 1308 is citing a decision which cannot have been more recent than 1289.<sup>4</sup> But, for the most part, in these early years of the fourteenth century, the Judges do not seem to go back beyond the latter part of the thirteenth century, particularly to the decisions of Hengham and Metingham. This would seem to mean that they are drawing chiefly upon their own experience at the Bar.

I must not give the impression that at this period

<sup>1</sup> *Anon.*, Y. B. 2 Ed. II (S. S. i), 186, 187: 'et sur ces allegerunt un auciene fet qe fut de un Sire Henri de Berkelee' (nothing else known of this).

<sup>2</sup> *Peter of Peckham's Case*, referred to by Stanton J. in *Bacon v. Friars Preacher*, Y. B. 3 Ed. II (S. S. iii), 198, 199.

<sup>3</sup> *Anon.*, Y. B. 3 & 4 Ed. II (S. S. iv), 164: Ingham J. cites *Boys v. Charles*, Y. B. 3 Ed. II (S. S. ii), 168. *Leighton v. Hegham*, Y. B. 4 Ed. II (S. S. vi), 42: the reporter cites *Wyke v. Coleshull*, *ibid.* 44.

<sup>4</sup> *Anon.*, Y. B. 2 Ed. II (S. S. ii), 5, 6, *ante*, p. 126. The reference is to a decision of Weyland J., who was dismissed from the Chief Justiceship of the Common Pleas in 1289.

there was any explicit doctrine that precedents were 'binding'. If, for example, Bereford did not like a precedent, he had no hesitation in saying so; and there are at least hints in the reports that whether he liked it or not depended to some extent on the state of his temper.<sup>1</sup> In *Berewyk v. Brembre*<sup>2</sup> a writ of debt was brought against B and C of forty pounds. B came to Court and acknowledged that he was bound by specialty for the debt. But C pleaded that she was a married woman on the day when the writ was purchased, and still was so. Counsel asks for execution as to a moiety, and damages. Stanton J., evidently *dubitans*, waits until the Chief Justice comes, and puts the matter before him. Bereford is clearly out of humour. 'A plague on your covenants!' he cries. 'They are a nuisance to the Court!'<sup>3</sup> Apparently there followed a discussion on the Bench; then:

'Stanton J. said that he had seen a tenant make two attorneys in the time of Metingham J. One came and said nothing; the other denied [something]; and then the judge made the tenant come in his own person.

'Bereford C.J. *That was a mistake.* We will not do so; but we will enquire whether the woman was covert or not; meanwhile let execution against him who has acknowledged the deed remain in suspense, &c. And so the matter stood.'

In *Drinkstone v. Prioress of Markeyate*,<sup>4</sup> Hedon *arguendo* cites *Cooper v. Delegold*, a reported case to which Bereford was a party,<sup>5</sup> and urges that 'we have seen damages awarded in similar circumstances'. All the

<sup>1</sup> One can imagine the reporter's sly smile as he records Bereford's outburst against the learned Hengham: '*Bereford irascitur, dixit*: Do you think, John Hengham, to embarrass the court in this plea as you did in the case of Christian the widow of John Chaloner? *Par seint Jake*, you shall not!': *Anon.*, Y. B. 4 Ed. II (S. S. vi), 168, 169, referring to *Chaloner v. Conduit*, *ibid.* 18.

<sup>2</sup> Y. B. 4 Ed. II (S. S. vi), 9.

<sup>3</sup> 'Meschaunce aveigne a vos covenautz; il encombrent la court.'

<sup>4</sup> Y. B. 5 Ed. II (S. S. xi), 96, 98.

<sup>5</sup> Y. B. 5 Ed. II (S. S. xi), 84.

Chief Justice has to say is, 'You will never see them so long as I am here'. The Judges seem sometimes to have taken a strong line of their own, even to the point of ignoring quite well-established doctrines.<sup>1</sup> A scientific search for precedents did not exist—indeed, in the nature of the case, it could not exist. There were no 'reports' as we understand them. The Year Books themselves were certainly nothing of the kind; and if they had been intended to be so, they would have been extremely defective guides as to *rationes decidendi*, for they concern themselves for the most part with points of pleading and with the discussion of the case rather than with the actual decision. In fact, the decision is often left to conjecture. As has been said, the only authoritative source of decisions was the Plea Rolls themselves. But Plea Rolls are obviously not things which can be produced easily in Court; it was no light matter to search them or have them searched; and there is ample evidence that they were very difficult of access even to prominent counsel.<sup>2</sup> Lawyers therefore had to rely, as we have seen that they did, on their own memories, doubtless assisted by current notes. And if there is no reference to 'reports', because they did not exist, neither is there reference to what did exist—viz. learned treatises. To speak of a 'system of precedents' in connexion with the Year Books would be a complete anachronism. Nevertheless, the foundations of our case-law do most plainly exist in these medieval reports. Their very *raison d'être* was the instructive value of the *res iudicata*, or the arguments and pleadings leading to the *res iudicata*. The Judges

<sup>1</sup> See *Thornhead v. Salkeld*, Y. B. 5 Ed. II (S. S. xii), 69, and Mr. Bolland's observations thereon, *ibid.*, Introd., xviii ff.

<sup>2</sup> Bolland, *Lectures on the Year Books*, 34; Holdsworth, *Sources and Literature of English Law*, 82 ff. Professor Holdsworth also points out (*L. Q. R.* xlii. 254) that a great change was bound to come over the records of decisions when medieval oral pleadings gave place to written pleadings. The Year Books are, after all, only notes of *things said* in Court.

appear to have been well aware that their decisions were helping to make the law. In 1305 Hengham addresses counsel thus emphatically: 'Leave off your noise and deliver yourself from this account; and afterwards go to the Chancery and purchase a writ of Deceit; *and consider this henceforth as a general rule (e ceste reulle tiegne desormes generale).*'<sup>1</sup> In 1310 Bereford declares that 'by a decision on this avowry we shall make a law throughout all the land'.<sup>2</sup> In 1313 Stanton J. said 'that if judgement had been given against the claimant on this point he would have been without recovery for all time; *and that you may safely put in your books for law.*'<sup>3</sup> And Bereford C.J. said the same.<sup>4</sup> Whether or not Stanton was referring to a report which he knew was being taken of that particular case, it is impossible to say. The Year Books themselves may conceivably be referred to in 'your books'; but they were never adduced as actual authorities in Court.<sup>5</sup> Yet they greatly affected the conception and application of precedent. By the middle of the fourteenth century Hillary J. says, 'We will not *and we can not* change the ancient usages'.<sup>6</sup> After law-reporting, however limited in range, has been exerting its influence for a century and a half, we may observe the effect in some significant remarks of Prisot C.J. In 1454<sup>7</sup> he observes that a certain point has been decided a dozen times in our books,<sup>7</sup> and 'if, Sir, this be now adjudged

<sup>1</sup> *Anon.*, Y. B. 33 & 35 Ed. I (R. S.), 4.

<sup>2</sup> *Venour v. Blount*, Y. B. 3 & 4 Ed. II (S. S. iv), 161.

<sup>3</sup> 'Et que homme pout sauement mettre le en son liuere pur ley': *Midhope v. Prior of Kirkham*, Y. B. 7 Ed. II (S. S. xv), 172, 178.

<sup>4</sup> Maitland, Y. B. 3 Ed. II (S. S. iii), Introd., ix ff.

<sup>5</sup> *Anon.*, Y. B. 16 Ed. III (R. S.), 88.

<sup>6</sup> Y. B. 33 Hen. VI, f. 41 (Mich. pl. 17); see Maitland, Y. B. 3 Ed. II (S. S. iii), Introd., xv.

<sup>7</sup> 'Car jeo scay bien que la cause ad este traïse xii fois en nre livres, et sovent fois argues et ajuges, etc. et del' contrary nul Jugemt: mes ascun fois de gre le ddt. ad lesse de traïser la cause par l'opinion de ascun juge.'



no authority, as you contend, assuredly it will be a bad example to the young apprentices, who are students "in terms", for they will never believe their books if such a decision, which has been laid down so many times in their books, be now reversed.'

Sixteenth  
and  
Seven-  
teenth-  
Century  
Reports.

Coming now to the sixteenth century, the Year Books end abruptly and in future are known to lawyers chiefly through the Abridgements. Now begin those series of 'private reports' which will continue to flow forth in extraordinary abundance until the middle of the nineteenth century. The first use of the actual word 'precedent' which I have been able to discover<sup>1</sup> is in a case in Dyer of the year 1557. There it is said that a decision was given 'notwithstanding two presidents'.<sup>2</sup> The practice of citation is firmly established in these, the earliest of our important private reports. Dyer constantly refers to Year Book cases, as well as to Britton, Fleta, Littleton, and Fitzherbert.<sup>3</sup> Sometimes, as in the Year Books, counsel and judges seem to be relying on their memory: thus Willoughby cites a case of Lord Roos and Fitzherbert J. 'remembered this as Willoughby said'.<sup>4</sup> Some cases consist almost entirely of citations by Judges, counsel, or the reporter

<sup>1</sup> It is not, so far as I know, treated as a separate title in any of the Abridgements, and I am not aware of its use in any Year Book report, though I cannot profess to have searched them all.

<sup>2</sup> *Anon.*, 2 Dyer 148b. In the edition of 1588, which has been available to me (probably the second—Dyer's reports cover the period 1513-82), the words are: 'Et le briefe et judgement supra fuit rule per opinionem Curiae de Banco non obstante deux presidents, lun fur un nihil dicit lauter fur confession, monstre al contrary tempore E. Montague, S. que speciall judgement et briefe dexecution serra de lentier assets, quod est difficile ut credo, vide antea fol.' &c. The Montagu referred to was Chief Justice of the King's Bench 1539-45 (Foss, *Judges*, 449), so that the precedent was not very old; but Dyer's *caveat* seems to indicate that he doubted the accuracy of the report.

<sup>3</sup> e.g. *Warren v. Lee*, 2 Dyer 126b. Typical examples of his method of reporting may be found in *Anon.*, 1 Dyer 7a, and *Wise's Case*, 2 Dyer 144b.

<sup>4</sup> *Abbot of Bury v. Bokenham*, 1 Dyer 7b, 11a.

himself.<sup>1</sup> In Plowden (Reports, 1550-80) the same method is followed, and here we have one interesting statement of the principle of judicial uniformity.

'For *Onslow* and *Gerard* said that the records of every court are the most effectual proofs of the law in relation to the things treated of in the same court; and that which is used in one court is law in all courts, and throughout all the realm. And therefore in matters of the Crown, as in appeals of felony, and indictments of murder and treason and such like, if a question arises what is the law in such things, and what not, the records of the King's Bench are the most effectual proofs of it, and that which is used there ought to be taken as a proof of the law throughout the realm; for that court treats of such things, and has jurisdiction of them, and the records there are testimonies of the law in those points.'

And the same is said of the law of property in the Common Pleas and of the King's revenue in the Exchequer.<sup>2</sup> By the time of Coke (Reports, 1572-1616) the importance of reported cases as an instrument of judicial logic was fully recognized, though citation was perhaps not as novel a principle as he states in a characteristically categorical manner.<sup>3</sup>

<sup>1</sup> e. g. *Bold v. Molineux*, 1 Dyer 14a. In these early reports, unless one is fortunate enough to have access to a first edition, there is nothing except the dates of the cases (an insufficient guide) to show how many of the references are attributable to the author himself. It was the practice for subsequent editors to add great numbers of cases, and to announce this fact in title-page and preface as one of the chief attractions of the edition. At a later date, the habit of annotation grew up, so that the gloss sometimes became more bulky than the text. The classic example is Williams's Saunders. But it is indubitable that Dyer's method was largely based on precedent. His reports, like so many which followed them, were in inception and conception simply a Judge's note-book for his own guidance.

<sup>2</sup> *The Case of Mines*, Plow. 310, 320 (ed. 1791).

<sup>3</sup> Preface to Part X of his Reports, where he affirms that of olden time practitioners 'never cited any book, case or authority in particular'. This is true so far as it concerns the citation of specific cases by name as 'binding authorities'. We have seen (*ante*, p. 134) that no such method of citation was possible in the Middle Ages, even if it would have been accepted. But Coke's statement is misleading if

In the passage just cited from Plowden it will be observed that the reference is not so much to the *ratio decidendi* of cases as to the *mos iudiciorum*. This is characteristic of most of the seventeenth-century reports. When Hobart (Reports, 1603-25) speaks of precedent, he is nearly always thinking of the practice of the Courts in matters of *pleading*.<sup>1</sup> The application of precedents of this kind is very rigorous, and the Court will follow them even when it disagrees with the rule they embody. The sheriff of Norfolk's return to a writ for an inquiry of damages for slander is held insufficient in law: 'but yet the Court would not reverse the judgement, because there were divers of the like, both in the King's Bench and Common Pleas, especially in Suffolk and Norfolk in later times.'<sup>2</sup> A new form of writ of waste is held to be 'wanting substance', yet is allowed 'because the Clerks of the Chancery affirmed and showed their books that they had used this form always in that case since the making of the statute'.<sup>3</sup> Something of the same kind is to be

taken to mean that the persuasive influence of case law and analogy was unknown in medieval law. I have already given evidence to the contrary from the Year Books; and would add that if it were otherwise, it is inexplicable—or, so far as I know, unexplained—why the method of precedents should appear so decisively, and yet so suddenly, in Dyer. The view that 'there is no case-law in the Year Books' seems to me to be misleading in that it uses the term 'case-law' in a sense which, as I attempt to show here, was not settled in our law till the nineteenth century; see, e. g., Winfield, *The Chief Sources of English Legal History*, ch. vii. It goes without saying that Coke himself enormously affected and developed the scientific application of precedents; but he did not invent the system.

<sup>1</sup> Thus in a writ of assize, the court will not amend *illum* to *illam* because in one case of 11 Hen. VII it had been so held: *Ogleshorp v. Maud*, Hob. 128. Cf. *Blount's Common Recovery*, *ibid.* 196: *Bird v. Snell*, *ibid.* 249. The word 'precedent' has always been somewhat ambiguous in English law, since it is used not only of decisions in general, but in a special sense of model forms of pleading and conveyancing.

<sup>2</sup> *Virely v. Gunstone*, Hob. 83. Note the reference to local practice.

<sup>3</sup> *Skeat v. Oxenbridge*, Hob. 84.

found in Yelverton (Reports, 1603-25);<sup>1</sup> here again 'precedents' seem generally to refer to matters of procedure.<sup>2</sup> However, the importance of substantive precedents is not ignored. As early as Croke's Elizabethan Reports, it is laid down that 'being there is not any president found thereof, it is a good argument that the action is not maintainable';<sup>3</sup> and a little later that 'presidents are founded upon great reason and are to be observed';<sup>4</sup> and 'these things which have been so often adjudged ought to rest in peace'.<sup>5</sup> In Hobart, the Star Chamber lays down that 'presidents of Courts as well as laws are built upon reason and justice, and *tantum habent de lege quantum habent de Justitia*'.<sup>6</sup> Jenkins, in the preface to his Reports, which cover the period Charles I and the Commonwealth, deprecates 'variety of judgements and novelty of opinions (those two plagues of the Commonwealth)' and pays a tribute to the authority of Littleton, whose treatise, he says, is filled with resolutions of the Courts, and 'the learned from his time to ours have constantly adhered to these resolutions, and not departed from them in the least'.

The first attempt, so far as I have discovered, to lay down a studied theory of the authority of precedents, and to distinguish between dicta and *rationes decidendi*, occurs in the Reports of John Vaughan, who was Chief Justice of the Common Pleas from 1668 to 1674. In

Vaughan's principles.

<sup>1</sup> 'Sed non allocatur; for 1,000 precedents are contrary; and in respect of the continual use to lay the statute in this form as the plaintiff has declared, the Court said they would not alter it, for that would be to alter all the judgements that were ever given in this Court': *Oliver v. Collins*, Yelv. 126, 127.

<sup>2</sup> e. g. *Charnell v. Holland*, Yelv. 49, and *Weaver v. Clifford*, *ibid.* 42, where occurs the interesting dictum that precedents in the Chancery do not 'close the mouths of the Judges of the Common Law'.

<sup>3</sup> *Dampori v. Symson*, Cro. Eliz. 520, 521.

<sup>4</sup> *Robins v. Sanders*, Cro. Jac. 386, though here the point is purely one of form—whether judgement should be entered as *concessum est* or *consideratum est*.

<sup>5</sup> *Spicer v. S.*, Cro. Jac. 527.

<sup>6</sup> *Courteen's Case*, Hob. 270.

the case of *Bole v. Horton*, at p. 382 of his Reports, the following principles are laid down :

‘ An extra-judicial opinion given in or out of Court is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless everything spoken at pleasure must pass as the speaker’s opinion.

‘ An opinion given in Court, if not necessary to the judgement given of record, but that it might have been as well given if no such, or a contrary opinion had been broached, is no judicial opinion, nor more than a *gratis dictum*. But an opinion, though erroneous, concluding to the judgement, is a judicial opinion, because delivered under the sanction of the judge’s oath, upon deliberation, which assures it is, or was, when delivered, the opinion of the deliverer. Yet if a Court give judgement judicially, another Court is not bound to give like judgement, unless it think that judgement first given was according to law. For any Court may err, else errors in judgement would not be admitted, nor a reversal of them. Therefore, if a judge conceives a judgement given in another Court to be erroneous, he being sworn to judge according to law, that is, in his own conscience, ought not to give the like judgement, for that were to wrong every man having a like cause, because another was wronged before, much less to follow extra-judicial opinions, unless he believes those opinions are right.’

In the same strain he declares : ‘ Presidents are useful to decide questions, but in such cases as these which depend upon fundamental principles, from which demonstrations may be drawn, millions of presidents are to no purpose.’ Therefore procedural precedents of process issued by Sheriffs of Wales are not necessarily to be accepted, without a judicial decision confirming them : ‘ many things may be done several ways (as Bonds) though they have regularly one common form, yet they may be in other forms as well.’<sup>1</sup>

Vaughan’s principles might well be adopted by any French Court at the present day. They constitute a reaction against the austerity of the *mos iudiciorum*

<sup>1</sup> *Concerning Process into Wales*, Vau. 419.

exemplified by the cases cited above from Hobart. To the same effect is Hale. 'It is true', he says,

'the decisions of courts of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attain, yet they do not make a law properly so-called (for that only the King and Parliament can do); yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.'

In the eighteenth century, precedents are freely quoted, and Blackstone lays it down that the duty of the Judge is to abide by former precedents.<sup>2</sup> But the Common Law Judges, especially under the influence of Lord Mansfield, hold themselves free to appraise decisions, or supposed decisions, purely on their own merits. Citations are frequently 'doubted or denied' and are even collected under that head in the index to Burrow's Reports (1757-71). A decision which does

<sup>1</sup> *Hist. Com. Law*, ch. iv, p. 67 (ed. 1739).

<sup>2</sup> 1 *Comm.* 69: 'For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgement, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. . . . The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust.' Christian adds a cautious note on the dangers of the *argumentum ab inconvenienti*.

not commend itself to the Bench is simply dismissed as 'a strange case' or 'contrary to all experience'.<sup>1</sup> In the famous case of *Pillans v. Van Mierop*,<sup>2</sup> Wilmot J. says roundly: 'Many of the old cases are strange and absurd: so also are some of the modern ones; particularly that of *Hayes v. Warren*.'<sup>3</sup> We begin to get outspoken criticism of reports and reporters, and when Lord Mansfield rejects precedents, he generally does so on the ground that the report is untrustworthy. For example, he denies any authority to the reports of Comberbach and Bunbury,<sup>4</sup> and refers to some of Lord Raymond's reports as 'very loose notes'.<sup>5</sup> No modern lawyer would be disposed to dissent from him.<sup>6</sup>

<sup>1</sup> *Denn v. Purvis*, 1 Burr. 326.

<sup>2</sup> 3 Burr. 1663, 1671.

<sup>3</sup> This case, in 2 Stra. 933, laid down the now accepted rule that 'assumpsit will not lie for a past consideration unless it was at the request of the party', and the reason for Wilmot J.'s contempt is not apparent, especially as he is propounding the bold doctrine: 'I cannot find that a nudum pactum evidenced by writing has ever been holden bad.'

<sup>4</sup> *Cooper v. Chitty*, 1 Burr. 20, 36; *Tinkler v. Poole*, 5 Burr. 2658-9.

<sup>5</sup> *Cooper v. Chitty*, *ubi sup.*

<sup>6</sup> Such criticisms were not altogether new. In 1704, in *Slater v. May*, 2 Ld. Raym. 1072, Holt C.J. exclaimed, referring to 4 Mod.: 'See the inconveniences of these scrambling reports; they will make us appear to posterity, for a parcel of blockheads.' In 1657, in an 'Address to the Students of the Common Laws of England', Sir Harbottle Grimston thus delivered himself: 'A multitude of flying reports, whose authors were as uncertain as the times when taken, have of late surreptitiously crept forth. We have been entertained with barren and unwarranted products, *infelix folium ex steriles avenae* (*sic*), which not only tends to the depraving of the first grounds and reason of the young practitioner, who by such false lights are misled, but also to the contempt of divers of our former grave and learned justices, whose honoured and revered names have in some of said books been abused and invoked to patronize the indigested crudities of these plagiaries; the wisdom, gravity and justice of our present justices not deeming or deigning them the least approbation or countenance in any of their courts': cited Veeder, 'The English Reports', *Select Essays in Anglo-American Legal History*, ii. 124. 'Strong words', says Maitland [Y. B. 3 Ed. II (S. S. iii), *Introd.*, xvi], 'concerning certain reporters have fallen from the Bench before now, and until recently

Lord Kenyon is commonly supposed to have revolted against the innovating spirit of Lord Mansfield, and in one of those Latin tags for which he became unenviably famous, is reported to have said: 'It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate, but by my industry I can discover what our predecessors have done, and I will tread in their footsteps.'<sup>1</sup> Yet if Espinasse, as cited in Lord Campbell's hostile biography,<sup>2</sup> is to be believed, Lord Kenyon's impatient temper sometimes led him to treat the opinions of his predecessors with scant respect. Espinasse's evidence, however, refers to dicta rather than to actual decisions.<sup>3</sup> The value of good reports, and the high place they had now attained in the structure of the law, is well shown by the preface to Douglas's Reports (1774-6), where large claims are made for the creative power of decided cases. 'Deductions thus formed, and established in the adjudication of particular causes, become, in a manner, part of the text of the law. Succeeding Judges receive them as such, and, in general, consider themselves *as bound to adhere to them no less strictly than to the express dictates of the legislature*.' On the fidelity and accuracy of reports, he says, 'a very great part of the law of England almost entirely depends'.

The evidence is conflicting. In accordance with the tradition of medieval pleading, there seems to have been a tendency in the sixteenth and seventeenth centuries a well-read lawyer was expected to know that this or that volume was, to put it mildly, "not a book of high authority". We suppose that the veriest beginner might be heard to say in court that some case reported by Keble, or Siderfin, or Comberbach is worthless.' Cf. Odgers, *The Common Law* (2nd ed.), i. 69, and 1 Bl. Comm. 72.

General  
view of  
precedent  
up to end  
of the  
eighteenth  
century.

<sup>1</sup> Quoted 1 Kent Comm. 479.

<sup>2</sup> *Lives of the Chief Justices*, vol. iv.

<sup>3</sup> *Ibid.* 93: 'Having occasion to contravene a dictum of C. J. Holt, "he wondered that so great a judge should have descended to petty quibbles to overturn law and justice"; and when a saying of Lord Mansfield was cited respecting the right to recover a total loss on a valued policy, with a small interest actually on board, he declared that "this was very loose talking, and should not be ratified by him".'



to regard precedents of *adjective* law as peculiarly authoritative, but in the later seventeenth and in the eighteenth century there are signs of revolt against what was felt to be a tyranny. The truth is, I believe, that English jurisprudence had not yet developed any very clear doctrine as to the function of precedent. Practice did not altogether square with theory, and theory was not always consistent with itself. On the one hand there is an unmistakable practice of relying on *exempla*, on the other hand a conviction that *lex*, or more properly *ius*, is the only true source of authority. *Justice* is the primary duty of any tribunal. *Est boni iudicis ampliare iustitiam* is an accepted maxim.<sup>1</sup> To sum up the position at the end of the eighteenth century: the application of precedent is powerful and constant, but no Judge would have been found to admit that he was 'absolutely bound' by any decision of any tribunal. The characteristic view is well expressed in the words of Lord Mansfield in *Jones v. Randall* (1774), 1 Cowp. 37:<sup>2</sup>

'The law of England would be a strange science if indeed it were decided upon precedents only. Precedents serve to illustrate principles and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles, and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or the other of them.'

Modern  
doctrine  
of  
English  
Law.

To-day the accepted doctrine is the reverse. Whatever a modern Judge may think of a decision of the House of Lords, yet if it is clear and unambiguous he would never consider himself at liberty to depart from it with a view to 'amplifying justice'. How has the change come about? It is certainly a product of the nineteenth century, but I do not think it is possible to put one's finger on any precise point of time at which

<sup>1</sup> *Collins v. Blantern* (1766), 2 Wils. 341.

<sup>2</sup> There is an unintelligent, and at one point unintelligible, report of the same dictum in Lofft, 385.

the modern doctrine became finally settled. Insensibly it grows up, and two causes may have contributed to its final establishment—one, the semi-official regularization of the Law Reports in 1865, which settled any doubts as to the accuracy of the records of decisions; the other, the reforms of the Judicature Acts, which instituted a less complex hierarchy of Courts, and minimized any problems of competing jurisdictions.

Even before this, in 1833, one of the greatest common lawyers of the nineteenth century expounded the contemporary theory of precedent in the following authoritative terms:

‘Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.’<sup>1</sup>

No Judge at the present time would need any reminder to keep this principle ‘steadily in view’. But even here the learned Judge makes an express reservation in regard to cases which are ‘plainly unreasonable and inconvenient’. In some respects, the final doctrine is not beyond controversy until quite late in the nineteenth century. In a number of cases it is still debated whether the House of Lords is bound by its decisions,<sup>2</sup>

<sup>1</sup> Per Parke J., *Mirehouse v. Rennell*, 1 Cl. & F., 527, 546.

<sup>2</sup> *R. v. Millis* (1843), 10 Cl. & F. 534; *Bright v. Hutton* (1852), 3 H.L.C. 341; *Beamish v. B.* (1859), 9 H.L.C. 274; *Att.-Gen. v. Dean &c. of Windsor* (1860), 8 H.L.C. 369; *Caledonian Railway Co. v. Walker's Trustees* (1882), L.R. 7 App. Cas. 259. See Pollock, *First Book of Jurisprudence*, 329 ff.

and as late as 1898<sup>1</sup> the Lord Chancellor thinks this matter still sufficiently controversial to require an *ex cathedra* pronouncement. The authority of decisions by the Privileges Committee of the House of Lords even now remains in some doubt.<sup>2</sup> But the general principle of uniformity is now unquestionable. It remains to consider its operation in the work of the courts.<sup>3</sup>

<sup>1</sup> *London Street Tramways Co. v. L.C.C.*, [1898] A.C. 375.

<sup>2</sup> *St. John Peerage Claim*, [1915] A.C. 282, 308, per Lord Parker; *Viscountess Rhondda's Claim*, [1922] 2 A.C. at p. 376, &c.

<sup>3</sup> On precedent in Equity see App. C, *post* p. 375.

## IV

### PRECEDENT: AUTHORITY AND OPERATION

#### I. GENERAL RULES FOR APPLICATION OF PRECEDENTS IN ENGLISH LAW

IT is unnecessary to make more than a very brief reference to the general rules now universally held to govern the application of precedent in English law. Each Court is bound by the decisions of Courts above it. The only Court of Appeal not recognized as unquestionably authoritative for Courts of first instance is the Judicial Committee of the Privy Council. Though the lower Courts theoretically reserve to themselves independence in respect of the Judicial Committee, and in at least one important principle of civil liability have politely but resolutely refused to follow its lead,<sup>1</sup> in practice the decisions of this tribunal are treated with almost as much respect as those of the House of Lords, of which, in personnel if not in jurisdiction, it is in a great measure the *alter ego*.

Individual Judges are not bound by each other's decisions, but according to the doctrine which has prevailed after considerable doubt,<sup>2</sup> the House of Lords and the Court of Appeal are governed by their own previous decisions. The Judicial Committee is not, in theory, so governed, but it is only with the greatest reluctance that it departs from its own precedents.<sup>3</sup>

Certain well-recognized principles of interpretation apply throughout.

<sup>1</sup> *Victorian Railway Commissioners v. Coultas* (1887), 13 App. Cas. 222; see *Coyle v. Watson*, [1915] A.C. 1, 13 (the now rejected rule that damages cannot be recovered for 'nervous shock' wrongfully caused by the defendant).

<sup>2</sup> *Ante*, p. 145.

<sup>3</sup> *Russell v. Reg.* (1882), 7 App. Cas. 829; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.

1. Any relevant judgement of any Court is a strong argument entitled to careful consideration.

2. Any judgement of any Court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true *ratio decidendi* was.

3. Antiquity does not necessarily derogate from a precedent, but rather strengthens its authority: unless the law has been definitely altered since the decision was given.

4. *Per contra*, it is well recognized that the law gradually adapts itself to changing social conditions and that very ancient precedents are often inapplicable to modern circumstances. For this reason they are cited with comparative infrequency. Precedents may be compared to wine which 'improves with age', up to a certain point, and then begins to 'go off'.<sup>1</sup>

5. There is no one sovereign system of recording precedents. They may be drawn from any source which the Court considers reliable—besides the regular and periodical series of reports, from newspapers, manuscripts, historical documents, or even the personal recollection of Judges.<sup>2</sup> Anybody may publish reports

<sup>1</sup> Bacon's view was that the safest precedents were those which were neither too old nor too new: 'medii itaque temporis exempla sunt optima, vel etiam talis temporis quod cum tempore currente plurimum conveniat': *De Aug.*, Lib. VIII, cap. iii, Aph. 24.

<sup>2</sup> Thus Lord Eldon in *Bulkley v. Wilford* (1834), 2 Cl. & F., 102, 177: 'I have in my possession at this moment the manuscript of that decree, which was quoted at the bar. I am sure it is genuine; I know the handwriting of Sir Anthony Hart, the then Lord Chancellor of Ireland. This manuscript which I now have shows the diligence and accurate attention which he gave to the subject, having corrected and recorrected it, in order that the principle might be understood upon which the decree was made.' Cf. the same Chancellor in *Sidney v. Shelley* (1815), 19 Ves. 352, 359, and Sir Cresswell Cresswell in *In the Goods of Alexander* (1860), 29 L.J. (P. & M.) 93: 'A gentleman,

of cases heard in open Court. But since 1865 there has been a series of reports in all Courts, recognized as of peculiar authority by the profession, though not in any sense sanctioned by the State.<sup>1</sup> As to cases since 1865, these reports receive more respect than any series (of which there are many) published by private enterprise, especially as the judgements recorded in them are often revised by the Judges themselves before publication.

## II. AUTHORITY OF PRECEDENT

These rules are the alphabet of his study to any modern English lawyer, and none of the observations which here follow is intended to cast the slightest doubt on their validity as an essential part of our

who is publishing a book on the practice of the Court of Probate, has kindly furnished me with a copy of the actual report made to Her Majesty by the Judicial Committee [in *Tatnall v. Hankey* (1838), 2 Moo. P.C. 342] which gives an express opinion on this very point. . . . This express opinion of the Judicial Committee is conclusive, and of course relieves me from all difficulty; and I therefore grant the motion.' See also an important manuscript authority on provocation in criminal law, relied on in Foster's *Crown Cases*, Disc. II, ch. v, p. 292 (ed. 1762); *Gibbon v. Pease*, [1905] 1 K.B. 810, 812; *Palgrave v. The Turid*, [1922] 1 A.C. 397, 413; and *L.Q.R.* xxxviii. 268. 'According to modern custom,' says Sir Frederick Pollock, 'any report vouched for at the time by a member of the bar may be used in court for what it is worth, although the citation of an unpublished report is not at all common nowadays' (*Essays in the Law*, 243).

<sup>1</sup> A desire is sometimes expressed for a single sanctioned and authoritative collection of reports. In 1885 Lord Lindley wrote: 'One thing however we do not get, and perhaps cannot hope for under existing arrangements; and that is, one set of reports which is alone to be regarded as containing an authoritative exposition of the law as declared and applied in the instances reported. But until we have one publication of judicial decisions which, and which alone, shall be received and acted upon as authoritative by our numerous tribunals, all reforms in Law Reporting must be regarded as transitional and incomplete': *L.Q.R.* i. 137. The suggestion here made has not so far borne fruit, but it is not unlikely that the mere problem of cubical contents will before long necessitate some drastic revision of the whole present system.

Authorita-  
tive and  
unauthori-  
tative pre-  
cedents.

legal system. But I suggest it is unfortunate that in our extra-judicial doctrine, though certainly not in the practice of the Courts themselves, a number of scholastic and, as it seems to me, unprofitable dogmas have grown up which tend to obscure the real function of precedent in our legal reasoning. So many arbitrary distinctions are drawn as to what precedents may be admitted and what may not, that we are in danger of regarding mere decisions *in themselves* as settling disputed points, and of forgetting the fundamental principle which governs the whole employment of precedent. That principle is stated by Sir George Jessel with his usual clarity, when he says :<sup>1</sup> 'The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him.' Simple and self-evident though this dictum may sound, it is not always kept in view. The result is that the form tends to be confused with the substance.

We ought not to approach the subject with *a priori* classifications in our minds. If we do, we are certain to commit ourselves to artificial distinctions which soon break down when applied to the actual business of adjudication. As an example of what I mean by *a priori* classifications, let me quote the following from a widely read modern text-book of Jurisprudence.

'The precedent is the legal source of the rule, and the others are merely its historical sources. The precedent is its source not merely in fact, but in law also; the others are its sources in fact, but obtain no legal recognition as such. Our law knows well the nature and effect of precedents, but it knows nothing

<sup>1</sup> *In re Hallett's Estate* (1879), 13 Ch.D. at p. 712. Cf. the same judge in *Osborne to Rowlett* (1880), 13 Ch.D. 774, 785 : 'I have often said, and I repeat it, that the only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle if that principle itself is not a right principle, or one not applicable to the case; and it is for a subsequent Judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle.'

of Pothier, or of Tribonian, or of the Urban Praetor. The proposition that every principle embodied in a judicial decision has for the future the force of law is not merely a statement of historical fact as to the growth of English law; it is itself a rule of law. But the proposition that much of the law of Rome has become incorporated into the law of England is simply a statement of fact, which has in law no relevance or recognition. . . .

'The legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by the law courts as of right; the latter have no such claim; they influence more or less extensively the course of legal development, but they speak with no authority. No rule of law demands their recognition. Thus both the statute book and the works of Jeremy Bentham are material sources of English law. The historians of that system have to take account of both of them. Much that is now established law has its source in the ponderous volumes of the great law reformer. Yet there is an essential difference between the two cases. What the statute book says becomes law at once and *ipso iure*; but what Bentham says may or may not become law, and if it does, it is by no claim of right, but solely through the unconstrained good pleasure of the legislature or the courts.'

The writer then proceeds to dismiss the 'historical' sources from his consideration as a lawyer and a jurist, and in his subsequent treatment of the sources of law omits them entirely.

'We are here concerned solely with the legal sources of law. Its formal source is involved in the definition of law itself . . . Its historical sources pertain to legal history, not to legal theory. Hereafter, when we speak of the sources of law, we shall mean by that term the legal sources exclusively.'<sup>1</sup>

All this sounds very clear and precise, but when we come to apply it in the Courts, its precision vanishes. We find the Judges disobligingly oblivious of these stern distinctions. For example, Pothier is a particularly unfortunate illustration of the theory advanced. As it happens, this foreign jurist has been treated as

Foreign  
jurists.

<sup>1</sup> Salmond, *Jurisprudence* (7th ed.), 165 f. On the distinction between 'formal' and 'material' sources, see *ante*, p. 1.



Authori-

an authority by our Judges on several very important points of law. In 1822 Best J. speaks of him in the following terms :

‘The authority of Pothier is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country. It is extremely well known that he is a writer of acknowledged character; his writings have been constantly referred to by the court and he is spoken of with great praise by Sir William Jones in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject.’<sup>1</sup>

Sixty years later, Lord Blackburn refers to him in the House of Lords with no less respect.<sup>2</sup> These are no mere empty compliments, as is shown by the series of cases based upon *Smith v. Wheatcroft* (1878), 9 Ch.D. 223. In that case Fry J. had to consider a difficult point as to *error in persona* of a contracting party. For the true principle to be applied this very learned Judge turned to Pothier’s *Traité des Obligations*. The passage which he cited from that work, not as mere illustration, but as decisive authority, has become a *locus classicus* in our law, and there is scarcely a modern case on the same point in which it is not applied as the proper test.<sup>3</sup> The gist of the matter is whether it will be so applied, and not whether we dub it ‘binding’ on the one hand, or ‘persuasive’, ‘legal’, or ‘literary’ on the other. It is true that the voice of Justinian is heard once in our

<sup>1</sup> *Cox v. Troy* (1822), 5 B. & Ald. 474, 480.

<sup>2</sup> ‘We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases where they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier, or any foreign jurists, provided they bore upon the point’: *McLean v. Clydesdale Banking Co.* (1883), 9 App. Cas. 95, 105.

<sup>3</sup> See *Nash v. Dix* (1898), 78 L.T. 445; *Gordon v. Street*, [1899] 2 Q.B. 641; *Phillips v. Brooks*, [1919] 2 K.B. 243; *Said v. Butt*, [1920] 3 K.B. 497.

Courts where the voice of our own legal authorities is heard a thousand times; and any counsel who based his argument solely on the Digest would occasion depression, if not a certain irritation, on the Bench.<sup>1</sup> But it is going much too far to say that our law 'knows nothing' of Tribonian and the Urban Praetor. It is going much too far to say that our law 'knows nothing' of any weighty exposition of any principle relevant to a case in hand. Some departments of our law have been settled almost entirely on the authority of the Digest. The most conspicuous example is the right to flowing or percolating water. On this point we find Tindal C.J. declaring that the authority of Marcellus in the Digest is not merely in favour of the defendant, but 'appears decisive'.<sup>2</sup> In *Bechervaise v. Lewis* (1872), L.R. 7 C.P. 372, the defendant had made himself a party to a joint and several promissory note, but as a surety only. Action being brought against him for the amount of the note, the question was whether the surety could avail himself, by way of equitable defence, of a set-off which his principal had against the payee (plaintiff). In the judgement of the Court, delivered by Willes J., not a single English case is cited, and the sole authority relied upon is a passage of the Digest (16.2.4). Roman Law, though never 'received' by us, has exercised an influence on our legal doctrine, as so great a system was bound to do, from the time of Bracton onward.<sup>3</sup> How far it directly inspired the beginnings of our equitable jurisdiction is still an open question.<sup>4</sup> To this day our highest tribunal contains Judges who have been trained in

Roman  
Law.

<sup>1</sup> See characteristic remarks of Halsbury L.C. in *Keighley, Maxsted & Co. v. Durant*, [1901] A.C. 240, 244.

<sup>2</sup> *Acton v. Blundell* (1843), 12 M. & W. 324, 353. Cf. arguments in this case, and judgement of Denman C.J. in *Mason v. Hill* (1838), 5 B. & A. 1.

<sup>3</sup> But on Blackstone's fanciful account of the authority of Roman Law in English Courts, see Pollock *apud* Maine, *Ancient Law*, Note G.

<sup>4</sup> See Kerly, *History of Equity*, 189.

Roman doctrines, to which they frequently and without hesitation have recourse. Anybody uninfluenced by academic dogmas would be indeed surprised, on reading the judgement of Holt C.J. in *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, or of Collins L.J. in *Durant v. Keighley, Maxsted & Co.*, [1900] 1 Q.B. 629, or of all the Peers in *Caniare San Rocco v. Clyde Shipbuilding Co.*, [1924] A.C. 226, to learn that the Digest has 'no relevance or recognition' in our Courts.<sup>1</sup>

Private  
International  
Law.

Something has been said already as to the creative influence of *Juristenrecht* as compared with customary law.<sup>2</sup> If we compare it in modern law with the influence of precedents, we find that its creative work is by no means exhausted and that it is not always possible to put it in the second rank as 'persuasive' merely. At least one great department of modern law, International Law, has been built up very largely on the researches and opinions of learned writers. I leave aside Public International Law, since its development is not complete, and its exact nature and authority as law are still open to controversy. But well-defined rules of Private International Law constantly have to be applied in our Courts. Now this is a comparatively recent growth in English jurisprudence. 'Down to the middle of the eighteenth century in England', wrote Frederic Harrison in 1879,<sup>3</sup>

'I cannot find a single opinion or decision which seemed to show the consciousness on the part of English lawyers that there was any branch of law such as we are now considering. . . . Our insular position, our complete detachment from the civil law, and our complete indifference to any systematic treatment of legal theory apart from cases of practice, explain the fact that down to the beginning of the nineteenth century Private International Law was absolutely unknown in this country.'

It could not remain indefinitely in this condition. The

<sup>1</sup> Cf. *Sinclair v. Brougham*, [1914] A.C. 398; *In re Booth*, [1926] P. 118.

<sup>2</sup> *Ante*, pp. 73 ff.

<sup>3</sup> *Jurisprudence and the Conflict of Laws*, 118.

nineteenth century had to construct a whole system of Private International Law. To what sources did it turn? Let me quote Mr. Harrison again,<sup>1</sup> reminding the reader that his words were written in 1879:

'And yet when a question of this class arises, it is seldom decided off-hand with reference merely to English decisions. Books are cited as authorities which are usually foreign; the decisions of foreign tribunals have frequently to be reviewed. An author such as Huber, a Dutch professor of the seventeenth century, is constantly quoted. American decisions, the codes of foreign countries, public treaties, old civilians, old and modern treatises on International Law, are continually appealed to. Story, Fœlix and Boullenois are in constant requisition, and the court will seriously attend to dicta of foreign lawyers writing under systems widely different from our own and from each other, whose notions of jurisprudence rest upon theories entirely contrary to our own.'

These authorities are appealed to not only in difficult and extraordinary cases; as Mr. Harrison points out, we have no separate jurisdiction for questions of Private International Law: they may arise in any Court at any time and in connexion with almost any kind of action, great or small. It goes without saying that at the present day, this branch of our jurisprudence having now been elaborated for upwards of a century and a half, our Courts do not rely solely on foreign jurists and foreign decisions. When Professor Dicey published the first edition of his *Conflict of Laws*, seventeen years after Mr. Harrison had written the above words, he made it his endeavour to pursue a positive rather than a theoretical method of analysis, and placed the sources of Private International Law in the order (1) statutes, (2) decisions, (3) 'such general principles as may be elicited from the judgements of foreign Courts, the opinions of distinguished jurists, and rules prevalent in other countries'.<sup>2</sup> By 1896 the amount of available English precedent had grown very considerably: it

<sup>1</sup> *Op. cit.*, 102.

<sup>2</sup> *Conflict of Laws* (1st ed.), 22; (3rd ed.) 23.

has continued to grow since that date, so that at the present time decisions can usually be relied on in any question of conflict of laws. It still remains true, however, that English decisions are much fewer in this branch of the law than in most others, and there is hardly a case in which the opinion of learned writers, such as Story, Westlake, or Dicey himself, is not cited as authority. In particular, the influence of Story has been predominant both in England and America, in regard to particular doctrines as well as to the whole foundation of this branch of the law. Story himself is a vast repository of the opinions of foreign jurists, who, through him, have unmistakably influenced our doctrine. Indeed, it is not too much to say that the true and recognized source of this new department of English law—at all events, as to its most essential components—is a stream of foreign juristic writing beginning in the fourteenth century; and that when Judges follow the precedents of our own Courts in this domain, they are often really affirming principles enunciated by Continental jurists of the sixteenth and seventeenth centuries.<sup>1</sup>

<sup>1</sup> See further, Harrison, *op. cit.*, and cf. the following observations of Sir R. Phillimore in *Reg. v. Keyn* (1876), 2 Ex.D. 63, 69 f.:

‘With respect to “justice, equity, convenience, and the reason of the thing”, one particular class of authority has been much relied upon in the arguments of counsel, namely, the treatises of learned writers on law, and it is perhaps in this case especially important to assign a proper, and not an extravagant, value to these digests of the principles of public and international jurisprudence.

“All writers upon the law of nations unanimously acknowledge it” was a fact that weighed greatly with Lord Stowell in the case of the *Maria*, which established the belligerent’s right of search.

‘Mr. Wheaton says:

“Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent, are placed as the second branch of international law”: *Elem. of Int. Law*, vol. i, p. 59.

‘Lord Mansfield, deciding a case in which ambassadorial privileges

In another and complex branch of our law, the opinions of learned practitioners and commentators has had great influence with the Courts, and to call them 'unauthoritative' is to do them much less than justice. Large and important parts of the law of Real Property have been developed almost entirely by the practice of conveyancers. To take the most prominent example, the Statute of Uses itself became a plaything in the hands of conveyancers, energetically seconded by the Court of Chancery. The widow could be barred from

Real  
Property.

were concerned, said that he remembered a case before Lord Talbot, in which he

"Had declared a clear opinion that the law of nations was to be collected from the practice of different nations and the authority of writers. Accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, &c., there being no English writer of eminence upon the subject."

'Chancellor Kent says:

"In cases where the principal jurists agree the presumption will be very great in favour of the solidity of their maxims, and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers of international law": Kent's *Com.*, vol. i, p. 19.

'Ortolan (*Dipl. de la Mer.*, line 1, p. 74) has some very sensible remarks on this subject, which he thus concludes:

"Ces publicistes ont non-seulement fourni, pour la gestion des affaires extérieures, une branche de droit international, qui supplée aux lacunes des autres et avertit de leurs vices, mais ils ont même contribué puissamment à la formation et à l'amélioration graduelle du droit international positif."

'It is also the opinion of a very learned living jurist (Dr. Franz von Holzendorf, *Encycl. der Rechtsw.* iv. *Das Europäische Völkerrecht*, p. 935) that the usage and practice of international law is in a great measure founded upon the tardy recognition of principles which have been long before taught and recommended by the voice of wise and discerning men, and that thus the fabric of international jurisprudence has been built up.

'Of course the value of these *responsa prudentum* (*sic*) is affected by various circumstances; for instance, the period at which the particular work was written, the general reputation of the writer, the reception which his work has met with from the authorities of civilized states, are circumstances which, though in no case rendering his opinion a substitute for reason, may enhance or derogate from the consideration due to it.'

her Common Law right to dower by the ingenious manipulation of uses, the express provisions of statutes could be nullified by the employment of such devices as bargain and sale and lease and release; and the modern settlement, on which the rights of so many owners of real property depend, is almost wholly the work of practitioners. When statute regulated the matter, as it did repeatedly in the nineteenth century, it followed the lines laid down by conveyancers in essentials. Much of real property law *is* conveyancing and nothing else. It is not surprising, therefore, that the Courts have consistently heeded weighty expositions of the practice of conveyancers coming from extra-judicial sources, and have not hesitated to treat them as authority. 'For the exposition of our very complicated real property law,' says Byrne J., 'it is proper in the absence of judicial authority to resort to text-books which have been recognized by the Courts as representing the views and practice of conveyancers of repute,'<sup>1</sup> and he proceeds to make reference, among other works, to Challis on Real Property—a book which has been constantly cited with approval in the Chancery Division.<sup>2</sup> Nor is this principle confined to any particular jurisdiction. In a very different branch of the law—Admiralty—we find a modern Lord Justice paying this compliment to extra-judicial doctrine:

'This is one of those cases dealing with damages which in my experience I have found to be a branch of the law on which

<sup>1</sup> *Hollis's Hospital and Hague's Contract*, [1899] 2 Ch. 540, 551.

<sup>2</sup> See also *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, and *Smith v. Earl Jersey* (1821), 2 Br. & B. 473, cited Pollock, *First Book of Jurisprudence*, 321. Cf. *Jessell M.R., London & South Western Railway Co. v. Gomm* (1882), 20 Ch.D. 562, 581. 'No doubt the practice of conveyancers is not law in the same sense as a statute or a judgement is law; and if it is founded on an erroneous view of the law it will be disregarded. But provided that it is unanimous, and provided that it is not contrary to any ascertained rule of law, it will be such cogent evidence of the law that it will rarely be disregarded by the courts': Holdsworth, *H. E. L.* vii. 386, *q.v.* iii. 219 ff., and vii. 384 ff. on the whole subject.

one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book on the subject.'<sup>1</sup>

### III. WORKING OF LEGAL INDUCTION

There is a danger in any mechanical dichotomy of 'legal' and 'historical' sources; for to divorce the history from the theory of the law is to court error. Let us remind ourselves of Sir George Jessel's simple principle, that precedents are employed *in order to establish principles*. Throughout the whole application of the law, the principles are primary and the precedents are secondary, and if we lose sight of this fact, the precedents become a bad master instead of a good servant. The business of a Court in deciding any particular issue is to work its way by the inductive principle which I have mentioned to a *rule*. To this end the arguments of counsel are directed, and the process from first to last is one of logical development. Any material of logical relevancy, whether it be 'legal' or 'historical' or 'literary', is legitimate and germane. Doubtless the best possible instrument of demonstration is the exact analogy of a previous case. But analogies are seldom exact, and counsel is rarely fortunate enough to be able to checkmate, so to speak, in one move. Almost invariably he has to justify or amplify his analogy from other sources, and it matters not what those sources are provided they are material to his main purpose. If he betakes himself to the opinions of reputable writers, to decisions of other countries, to history, to common sense, to natural justice, to convenience and utility, to the etymology and interpreta-

At the  
Bar.

<sup>1</sup> Per Atkin L.J., *The Susquehanna*, [1925] P. 196, 210. On books of authority in general, see 1 Bl. Comm. 72 ff. By a well-known professional convention, living writers are not cited as authority, but Bench and Bar may 'adopt' their statements as correct expositions of the law. This is in many cases little more than a polite fiction.



tion of words, he will never be stopped by the Court because the sources on which he is drawing are not 'legal'. He ceases to convince only when his argument, whatever its source, is beside the main purpose. This is as true of a legal argument as of any other kind of argument; and a legal argument is not governed by any peculiar magic of its own.\* Lawyers do not possess, and do not claim to possess, a monopoly of the art of dialectic. They have to deal in argument more frequently than other people, and they naturally develop a facility in doing so, but the principles of reason and logic upon which their arguments are based are the common property of mankind. The only reason why precedent figures so largely in the method they employ is because the analogy of precedent is a forcible method of demonstration in any and every argument. Parity of reasoning is as natural to logic as reasoning itself. It is more convincing than most other methods of demonstration simply because a close analogy is more convincing than a far-fetched analogy. Consequently the pleader relies on precedents as the most persuasive arguments he can adduce, and the Judge, with faculties specially trained to this end, becomes adept at distinguishing between the stronger and the weaker of the analogies presented to him.

On the  
Bench.

The Judge himself addresses his task in much the same way as counsel. His decision is given in the form of a structure of logic, in which he may use *any* material which he considers *ad rem*. If the matter is governed by the clear and unambiguous provision of a statute, his task is simplified. In the great majority of cases, no statute is applicable, and even if it is applicable, it is frequently the reverse of clear and unambiguous. The Judge must then proceed, as Bacon laid down long ago,<sup>1</sup> either by *parity of reasoning* ('vel per processum ad similia') or by *the use of examples*, though they have not been embodied in any statute ('vel per usum ex-

<sup>1</sup> *De Aug.*, Lib. VIII, cap. iii, Aph. 10.

emplorum, licet in legem non coaluerint'), or by rules of natural reason and discretion ('vel per iurisdictiones quae statuunt ex arbitrio boni viri et secundum discretionem sanam'). The method of his reasoning may take innumerable forms, and no rule of law limits and controls those forms provided they achieve a logical conclusion.

As an example of the mechanism of judicial logic I will take a case in which, though the point at issue was 'naked' and uncomplicated, the decision could be reached only by a careful logical progression. Two persons were in treaty for the sale of a certain brewery. Two copies, one the original and one a carbon copy, were typed of a document in which it was stated that 'I agree to purchase' the premises in question for £2,000, to pay £50 deposit, and certain other terms. Stokes, the prospective purchaser, signed the original; Whicher, the prospective vendor, did not himself sign the carbon copy, but it was signed by his agent duly appointed in that behalf, which amounts to the same thing. Stokes gave a cheque for the deposit, and Whicher's agent appended a receipt therefor to the carbon copy given to Stokes.

Whicher refused to complete, and Stokes brought action for specific performance.

*Main question.* This, being a contract for the sale of real property, requires a memorandum in writing. Legislation—the Statute of Frauds—imposes this main requirement and judicial decisions have added that the memorandum must contain, *inter alia*, a description or identification of the parties to the contract. Does this document, the carbon copy exhibited by Stokes, comply with these requirements?

Let us see by what stages the learned Judge arrived at his answer to this question—the sole question in the case.

*First subsidiary question.* Does this document, if valid in other respects, constitute an agreement by the de-

fendant to sell? Is it intended to impose, and does it impose, a contractual liability?

*Answer.* The true construction of the document is that Whicher means that he thereby agrees to sell, *to some individual*, the property comprised in the document and upon the terms therein stated.

*Second subsidiary question.* But does the document comply with the requirement that it must contain a description of the parties? The signature of Whicher's agent describes Whicher as 'Vendor', so that there is no doubt about *him*; but there is no description or identification of the purchaser. The purchaser is somebody who simply describes himself as 'I'. Is the Judge entitled to resort to evidence other than the document itself to discover who 'I' is?

*First answer.* *Long v. Millar* (1879), 4 C.P.D. 450, lays down that 'if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that transaction is'. To the same effect is another case relied on.<sup>1</sup> Now the receipt shows on the face of this document that on a certain date £50 was paid by cheque to the vendor as the agreed deposit. A cheque of same date for an amount which includes this £50, signed by Stokes, has been produced. Connecting these two documents, as is authorized by *Long v. Millar*, the Judge is entitled to conclude that 'I' is Stokes.

*Second answer.* 'The document is, as is quite obvious to the eye, a carbon copy of another document. It is called a contract.<sup>2</sup> The parties to the contract are the vendor who signs that particular document and some one else who is there mentioned as "I". That involves that "I" has contracted, for otherwise there would be no contract. "I" must have bound himself, otherwise the document could not be called upon its face a contract. Therefore, in the document itself I think I get a reference to some agreement or trans-

<sup>1</sup> *Pearce v. Gardner*, [1897] 1 Q.B. 688.

<sup>2</sup> It was so headed.

action binding "I". That being so, a document is produced before me bearing the same date, in the same words, with the same alterations in the body of it, also called a contract. It is obviously the original of which this document is the duplicate. The verbal evidence in the case proves that to be so, and that they were executed and exchanged at the same time; but, apart from that evidence, I am of opinion, finding as I do a reference in the document to some other transaction which is a transaction binding upon "I", that I am at liberty to enquire what that transaction was, and I find that it was a transaction evidenced in a written document which contains the purchaser's name; and so, in my opinion, I may connect those two documents and read them together as one.'

*Third answer.* The document is a complete memorandum except that it does not contain the purchaser's name. But the memorandum need not contain the *name* of the party: it is sufficient if it contains something which describes or identifies him. 'Does this document sufficiently identify "I"? I think it does. Taking the document as a whole, it shows that "I" is the person who has undertaken and discharged the obligation to pay £50, and it has been proved that the person who paid the £50 was Mr. Stokes; I am entitled to take that verbal evidence and so identify the person who is described as "I" as the person who has undertaken to discharge and has discharged that obligation.' Authority for that reasoning is *Carr v. Lynch*, [1900] 1 Ch. 613.

*Conclusion.* The memorandum is complete: therefore the vendor is bound: therefore there must be a decree of specific performance.<sup>1</sup>

<sup>1</sup> *Stokes v. Whicher*, [1920] 1 Ch. 411 (Russell J.). An excellent example of the stages in a long process of judicial reasoning may be found in the series of decisions affecting the acknowledgement of a statute-barred debt; see *Spencer v. Hemmerde*, [1922] 2 A.C. 507, especially the speech of Lord Sumner.

In what  
sense is  
the Judge  
'bound'?

In this typical example of judicial reasoning, it will be seen that there is a blend of pure logic based on the facts of the case, and logic based on the analogy of authorities: both are subservient to the principal purpose of 'subsuming' the case under a general rule. It must never be forgotten that the Judge has to review every precedent cited to him, not as an absolute formulation of a rule of law (like an article of a code), but as an *illustration* of some real or supposed proposition of law. We say that he is 'bound' by the decisions of higher Courts. But he is bound only at his own discretion, according to his own judgement. Nothing can make the process of 'binding' merely automatic and mechanical, for the Judge has first to decide, according to his lights, whether the illustration is really apposite to the principle he is seeking. The humblest judicial officer can disregard the most authoritative declaration of the House of Lords unless he considers that the precedent cited is 'on all fours'. It is therefore fallacious to regard the application of precedents in the Courts as a mere functioning of machinery. It is a complex process, depending greatly upon the faculties of individual Judges, from which it is dangerous to exclude arbitrarily any element simply by dubbing it 'unauthoritative'. The difference between authoritative and unauthoritative precedent is only the difference between what is logically relevant and what is not.

Precedent  
as against  
governing  
principles  
of Com-  
mon Law.

For underneath the whole elaborate structure of precedents in our Courts lies a permanent foundation of fundamental legal doctrine. 'It is a dangerous thing', says Coke, 'to alter or shake any of the fundamental rules of the common law, which in truth are the main pillars and supporters of the fabrick of the commonwealth.'<sup>1</sup> The isolated example which 'alters or shakes a fundamental rule of the common law' will itself soon fall to the ground and become neglected as a worthless ruin. I have already called attention to

<sup>1</sup> 2 Inst. 74.

a significant reservation made by Parke J. in his classic dictum as to the authority of precedents: they are binding, he says, 'where they are not plainly unreasonable and inconvenient'.<sup>1</sup> Nobody in his senses would imagine this to mean that an inferior Judge is at liberty to reject a principle laid down by the House of Lords merely because he does not consider it in the best interests of justice and convenience. What it does mean is that there are certain cardinal rules of English law which are more important than any decisions of any tribunals, and more 'binding' upon Judges than any individual cases. For all practical purposes, a precedent which ignores or misconceives a clear and positive rule of law is no precedent. Let us take an example which, though extreme, will sufficiently demonstrate my contention if it be well founded. Suppose the House of Lords were to give a decision in ignorance of a statute which, if it had been known, must have led to the opposite decision. If the statute were modern, this is so improbable as to be almost inconceivable; but if it were ancient, it is by no means inconceivable, considering the state of our 'statute-book'. Now if the error were discovered, it is hardly open to doubt that the case would not be regarded as a precedent. I do not believe that a single Judge would consider himself bound to follow it. If this be true, it can only mean that at bottom the Judge follows 'binding' authority only if and because *it is a correct statement of the law*. In almost all cases it is, to him, a correct statement of the law because it is not for him to set up his own opinions against a higher authority; but where it is plainly and admittedly founded on error,

<sup>1</sup> *Ante*, p. 145. Cf. Blackburn J. in *Stourbridge v. Driffield*, *post*, p. 188, and Blackstone's qualification, cited *ante*, p. 141, n. 2. Cf. Lord Ellenborough C.J. in *Vere v. Lord Cawdor* (1809), 11 East 568, 570: 'The question is whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which outrages all reason and sense, it is no authority to govern other cases.'

his obligation disappears. He owes a higher obligation to his mistress, the Law. We need not resort to extreme hypothetical cases to find illustrations of this principle. It is constantly to be observed that a precedent, of whatever origin, which is based on error, has the greatest possible difficulty in fighting against the current of legal doctrine. If it be derived merely from a strained or fanciful interpretation, it may succeed in perpetuating an anomalous or, so to say, an eccentric doctrine; but if it offends against one of the axiomatic precepts of law or reason, it may maintain itself for a short and harassed existence, but the collective displeasure of the profession will kill it in the end: and usually the end will not be long in coming. Every now and then, by one of those aberrations of which even the keenest minds are capable, an absurd and unreasonable principle like 'the doctrine of identification' creeps into our law. That particular anomaly managed to subsist for thirty years, which was a very long life for so sickly a creature; but it was doomed from birth, and when its time came, it was dispatched without scruple or apology.<sup>1</sup> Doubtless there are other doctrines of the Common Law which many think absurd and unreasonable,<sup>2</sup> but which have so far proved indestructible; but none, I think, which is a flagrant violation of reason and utility, indefensible on any rational ground. The *communis opinio doctorum* seldom fails to get its own way. Bad cases sometimes become so emaciated by ingenious methods of 'distinguishing' that they cease to have any vitality. When, for example, the House of Lords, in 1923, definitely overruled *Miller v. Hancock*, [1893] 2 Q.B. 177,<sup>3</sup> it merely set

<sup>1</sup> *Thorogood v. Bryan* (1849), 8 C.B. 115; *Mills v. Armstrong (The Bernina)* (1887), 12 P.D. 58.

<sup>2</sup> e. g. the doctrine of common employment, of accord and satisfaction, or the rule that no damages can be recovered for the death of a human being (see *post*, p. 185).

<sup>3</sup> *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74.

the seal on a process which had been going on for twenty years, and which had 'distinguished' this case out of any real authority. A decision, to be binding, must not only emanate from high authority, but must be 'good law': if it once earns the reputation of being 'not law',<sup>1</sup> it perishes sometimes by express disapproval, more often by cold disregard. If all else fails, the blame for its defects may be laid at the door of the reporter—often not without cause.<sup>2</sup>

If it is true that precedents are employed only to discover principles, so it is true that principles are employed only to discover justice. We speak of the Judge's function as 'the administration of justice', and we are sometimes apt to forget that we mean, or ought to mean, exactly what we say. Popular catch-words are too fond of distinguishing between the administration of law and the administration of justice, as if they were two different things. Nobody claims that the law always achieves ideal philosophical justice, but whatever the inevitable technicalities of legal science, they exist for the prosecution of one aim only, which is also the aim of the Judge's office: not to make interesting contributions to legal theory, but to do justice between litigants. This dominant purpose all precedents, all arguments, and all principles must subserve; and when precedents do not help, enlightenment must be found elsewhere. So we get those cases 'of first impression' which are by no means uncommon in the Courts, even at this day when so many permutations and combinations of circumstances have been considered and recorded. To what, then, do the Judges turn? To those principles of reason, morality, and social utility which are the fountain-head not only of English law, but of all law. The Judge is not embar-

Precedent  
and  
Justice.

<sup>1</sup> e. g. *Gibbons v. Proctor* (1892), 64 L.T. 594, or *Wilson v. Lady Dunsany* (1854), 18 Beav. 293, on which see Pearson J., *In re Kloebe* (1884), 28 Ch.D. 175, 180.

<sup>2</sup> See *ante*, p. 142, n. 6, and *post*, p. 178.



rassed by the absence of 'authority' in clear cases of this kind, for no authority is needed for the affirmation of the very essence of law. A husband connives at his wife's adultery and then turns her out of doors; she pledges his credit for necessities, and the husband disclaims liability. The Court makes short work of the matter.<sup>1</sup> 'There is no direct authority,' says Fry L.J. 'In my opinion to say that such circumstances justify the husband in turning his wife out of doors would be *morally and socially wrong*.' 'Nothing', says Lord Esher M.R., 'would induce me to declare that such was the law except a superior authority which would bind me.' An alien enemy is made a defendant in an action before an English Court. It is held that the action properly lies against him. 'The next question is, Can he appear and defend either personally or by counsel? I think', says Bailhache J., 'he certainly can. To allow an action against an alien enemy to proceed and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice. No state of war could, in my view, demand or justify the condemnation by a Civil Court of a man unheard.'<sup>2</sup> An infant pays for something which is not a necessary, consumes or uses it, and then demands his money back. The Court holds without hesitation that 'it is contrary to natural justice that he should recover back the money which he has paid'.<sup>3</sup> And so on: innumerable examples might be given. It is these guiding rules of right and reason which are constantly moulding the law to social conditions. Consciously or unconsciously, Judges are primarily and perpetually furthering them. In his eloquent lectures on *The Expansion of the Common Law*, Sir Frederick Pollock has reminded us of the vital part they played in the

<sup>1</sup> *Wilson v. Glossop* (1888), 20 Q.B.D. 354.

<sup>2</sup> *Robinson v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155 (view upheld in *Porter v. Freudenberg*, *ibid.* 857).

<sup>3</sup> *Valentini v. Canali* (1889), 24 Q.B.D. 166.

great legal developments of the nineteenth century.

'A hundred years ago', he writes,<sup>1</sup>

'the law of contract was, to say the least, very far from complete, and the law of negligence and all cognate subjects was rudimentary. No such proposition could then have been enunciated as that every lawful man is bound (exceptions excepted) to use in all his doings the case and caution, at least, of a man of average prudence to avoid causing harm to his neighbours, and is entitled in turn to presume that they will use reasonable care both for him and for themselves. Now it has become a commonplace, and the wayfarer who reads, as he approaches a railroad crossing, the brief words of warning, "Stop, look, listen", little thinks that they sum up a whole history of keen discussion. The standard of a reasonable man's conduct has been taken by courts from the verdicts of juries, and consolidated into judicial rules; and we have a body of authority covering all the usual occasions of men's business and traffic, and already tending to be, if anything, too elaborate. All this owes very little indeed to early precedents. The medieval feeling seems to have been rather that, outside a few special and stringent rules, a man should be held liable only for default in what he has positively undertaken. But the law was capable of growing to the demands of new times and circumstances; its conclusions in detail were not dogmas, but flexible applications of living and still expanding principles.'

The process of expansion and adaptation is still going on very visibly, and the student a hundred years hence will be able to discern just as distinct currents of legal theory in this age as we can now discern in the nineteenth century. The forces which produce these streams of 'prevailing doctrine' are deeper and subtler than the mere practice of Courts and the officers of Courts. It is possible to find in every legal system certain elemental principles which abide for all time, others which perpetually adapt themselves to environment. Both are vital, as they are in all organisms, and together they constitute a body of doctrine which is the primary pre-occupation of every Court. Precedent and example are at once the most convenient and the most reliable

<sup>1</sup> pp. 123 ff.

means for discovering them ; but they form only one, though the chief, among many such means. The difference between the authoritative and the so-called 'persuasive' sources is one of degree, not of kind.

How far  
do Judges  
make law?

To what extent are these underlying legal principles independent and pre-existent, to what extent are they the product of judicial reasoning? We have seen that the English Judge exercises a function more professedly creative than a Continental Judge; and that at its most critical and formative period much of our Common Law took its shape from doctrines consciously evolved by the Royal Courts.<sup>1</sup> If we examine the great legal tendencies of the nineteenth century to which Sir Frederick Pollock refers, we shall find the hand of the Judge equally active in moulding the doctrines of the law. A great deal of controversy has centred round this question, how far the Judge can and does legitimately 'make' law. We must use this word 'make' with caution; and I think we shall find that, in one sense of it at least, Judges are not merely resorting to what Austin called 'a childish fiction' when they disclaim the capacity to create new law.

There are, as I have mentioned, a number of cases, by no means inconsiderable, where Judges have to lay down a rule for the first time without any assistance from express enactment or previous decision. At the present day, such cases naturally tend to diminish in proportion as the bulk of reported cases grows. It is very seldom indeed that a Judge cannot find guidance of some kind, direct or indirect, in the mass of our reported decisions—by this time a huge accumulation of facts as well as of rules.<sup>2</sup> But in an appreciable number of cases he cannot find this guidance. The

<sup>1</sup> *Ante*, pp. 81 ff.

<sup>2</sup> Even Bentham, the relentless enemy of judge-made law, could not withhold a tribute from the comprehensiveness (even in his day) of our precedents. 'Traverse the whole Continent of Europe—ransack all the libraries belonging to the jurisprudential systems of the

thousands of volumes of reports are silent on this one point. Rare though this occurrence is nowadays, it is more frequent than one might imagine possible in view of the dimensions of our case-law. To take one matter alone—in the greatly changed structure of modern, and especially post-war, society, Judges may at any moment be faced with quite unprecedented points of public policy, and these they must sometimes decide not only without express authority but, what is far more irksome, without evidence to help them.<sup>1</sup> It is often remarkable that questions which, one would have thought, must have arisen repeatedly in everyday dealings, have never been the subjects of judicial decision. Judges sometimes express their pained surprise at this embarrassing fact.<sup>2</sup> What more common source of strife among neighbours than the predatory habits of domestic animals? Yet, if we exclude cattle and dogs, there is remarkably little authority on this subject, and at the date of writing these lines the Courts have just considered,<sup>3</sup> apparently for the first time in their history, whether a man is liable for his cat which hunts and kills his neighbour's birds. What more ready form of fraud for those who are expert in artful dodges than to walk into a jeweller's shop and say, 'I am Sir Somebody Something, the well-known millionaire: here is my cheque, kindly let me have these diamonds'? When the cheque turns out to be that not of a millionaire but of a common cheat, is the con-

several political states—add the contents all together—you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement—in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases': *Papers on Codification in Works*, iv. 461.

<sup>1</sup> e.g. *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635; *Montefiore v. Munday Motor Co.*, [1918] 2 K.B. 241.

<sup>2</sup> e.g. *Hartley v. Hymans*, [1920] 3 K.B. 475; *Gayler v. Davies*, [1924] 2 K.B. 75.

<sup>3</sup> *Buckle v. Holmes*, [1926] 2 K.B. 125 (see *L. Q. R.* xlii. 146).

tract of sale void or voidable? Upon that question will turn the rights of third parties who have since bona fide acquired the goods. This fraud must have been practised time out of number, yet when the point arose in a very well-known case,<sup>1</sup> there was not a single English decision upon it and the Judge had to turn to the American Courts for guidance. What more common accident than that a tree on premises adjoining a highway should, without negligence on the part of the occupier of the premises, fall and injure a passer-by? Yet there was no authority governing this case when it arose.<sup>2</sup> Such cases of first impression do still occur, and always will occur, though doubtless as time goes on they will become even more exceptional than they are now. A Judge, in laying down a rule to meet these unprecedented circumstances, is certainly making a new contribution to our law. Here, if anywhere, he is 'making' law. Yet even here he is making it only within certain limits, usually well defined. If he has to decide upon the authority of natural justice, or simply 'the common sense of the thing',<sup>3</sup> he employs that kind of natural justice or common sense which he has learned from the study of the law and which he believes to be consistent with the general principles of English jurisprudence. The 'reason' which he applies is, as Coke said, not 'every unlearned man's reason', but that technically trained *sense of legal right*—we need not follow Coke so far as to call it 'the perfection of reason'—with which all his learning imbues him. The public policy which he will apply to a new point is what he understands public policy to be from studying it in other legal connexions. The phrase commonly used is that he decides 'not on precedent, but on principle'. The difference is that in the one case he is applying a principle illustrated by previous examples, in the other

<sup>1</sup> *Phillips v. Brooks*, [1919] 2 K.B. 243.

<sup>2</sup> *Noble v. Harrison*, [1926] 2 K.B. 332.

<sup>3</sup> *Pearce v. Gardner*, [1897] 1 Q.B. 688.

case he is applying a principle not previously embodied, but consonant with the whole doctrine of law and justice. Although, therefore, he is making a definite contribution to the law, he is not importing an entirely novel element into it.

Still less, in that overwhelming majority of cases where precedent is cited and relied upon, is the Judge seeking to import anything novel into the law. His whole effort is to find the law, not to manufacture it. He is always working with materials which exist *in the present or the past*; his concern is not with the future effect of the rule he is laying down, but with the application of what he conceives to be an existing rule to a concrete case before him. He cannot, however much he may wish to do so, sweep away what he believes to be the prevailing rule of law and substitute something else in its place. In this sense, it is no 'childish fiction' to say that he does not and cannot 'make' law, and it was not without reason that Lord Esher M.R. said: 'There is in fact no such thing as judge-made law, for the Judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.'<sup>1</sup>

Compare now the function of the legislature in 'making' law. It is at once apparent that it has an entirely different prerogative: it is not confined to law in the present or the past, but may do as it wills with the future. It can 'make' new law in a sense which is quite precluded to the Judge. It *legislates* where the Judge *interprets*. By no possible extension of his office can a Judge introduce new rules for the compensation of injured employees, for national health insurance, for the rate of taxation, for the appropriation of public

<sup>1</sup> *Willis v. Baddeley*, [1892] 2 Q.B. 324, 326. Cf. Farwell L.J., *Baylis v. Bishop of London*, [1913] 1 Ch. at p. 137: 'It is in my opinion impossible for us now to create any new doctrine of the Common Law.'

money, for the franchise, for summer time, for the supply of gas, water, electricity—to take at random instances which affect everybody's daily affairs. The legislature can project into the future a rule of law which has never before existed in England. The Courts can do nothing of the kind. And while it is true, as has already been pointed out, that a decision founded on plain error does not usually survive for long, the Courts cannot, like the legislature, at their pleasure abrogate a settled doctrine which they think would be better expunged from the law. To take one example, before the year 1891, many Judges did not disguise their strong disapproval of the rule that a woman could not recover damages for an oral imputation of unchastity without proving special damage. But they were powerless to change the rule, and what they were powerless to do, Parliament did with a stroke of the pen.<sup>1</sup> Judicial disapproval of the Trade Disputes Act, 1906, has been expressed in unmeasured terms;<sup>2</sup> but it has to be upheld and applied.

Thus there are two distinct senses in which we may speak of 'making' law. Let us not forget, in applying the expression to the Judge, that we use it only in a derivative or secondary sense. Otherwise we are in danger of obscuring his essentially interpretative function. *In this secondary sense*, but only so, the Judge does undoubtedly 'make' law. It is not an original act of creation. Every act of interpretation shapes something new, in a secondary sense. A man who chops a tree into logs has in a sense 'made' the logs. A man who annotates a code has 'made' a learned work, but he has not 'made' a system of law. Man-kind, with all its resource and inventiveness, is limited in its creative power by the physical material vouchsafed to it. Similarly the creative power of the Courts is limited by existing legal material at their command.

<sup>1</sup> Slander of Women Act, 1891.

<sup>2</sup> See, e. g., Farwell L.J. in *Conway v. Wade*, [1908] 2 K.B. 844.

They find the material and shape it. The legislature may manufacture entirely new material.

Nevertheless, this limited creative power of the Courts is of the utmost importance to the development of law. If we compare the work done by the Courts and by the legislature, we find that they are usually operating in two quite distinct spheres of law. In regard to the substance of English law as a system of jurisprudence—the underlying principles of right and duty—it is the Courts which take the lead. It is comparatively rarely that the legislature interferes in this domain, except to gather up loose ends, to resolve a doubt, or to abrogate a principle which has become inconvenient. It may regulate when doctrine has become obscure or inexpedient, and when it does so, it usually takes its cue from the Judges: it may codify a part of the law which, though well settled, has become scattered and unwieldy in form; but it seldom lays hands on any of those principles which lawyers have come to regard as fundamental. It is difficult, for example, to imagine an enactment laying down that consideration should not be necessary to a simple contract, or that an accused person should be presumed guilty until proved innocent, or that trespass should be actionable only on proof of wilful intent, or even that slander should be actionable *per se*. The legislature *may* enact any of these things—for all we can predict, conditions may some day arise which will make these changes necessary: settled doctrines have from time to time been radically changed by statute—e.g. Common Law doctrines of the relationship between master and servant, and of the common crime of larceny, have been revolutionized in some respects: to take a minor illustration, when the tralatian doctrine of liability of domestic animals is found insufficient to protect cattle against marauding dogs, a Dogs Act is passed; or, to turn to equity, many cherished doctrines of conveyancing are swept away by Law of Property Acts. But



a glance at any yearly volume of statutes will show that enactments of this kind are in a very small minority. The great bulk of legislation is concerned with public law. It is for the most part of a social or administrative character, defining the reciprocal duties of State and individuals, rather than the duties of individuals *inter se*. 'When the authors of books on jurisprudence write about law,' says Sir Courtenay Ilbert,<sup>1</sup>

'when professional lawyers talk about law, the kind of law about which they are usually thinking is that which is to be found in Justinian's Institutes, or in the Napoleonic Codes, or in the new Civil Code of the German Empire, that is to say, the legal rules which relate to contracts and torts, to property, to family relations, to succession and inheritance, or else the law of crimes as it is to be found in a Penal Code. They would include also the law of procedure, or "adjective law" . . . in accordance with which these substantive rules of law are administered by the courts. These branches of law make up what may perhaps be called "lawyer's law". Now, no legislature in the world has asserted more continuously, more trenchantly, or more effectively, its supremacy over every branch of the law than the British Parliament. It has indirectly altered the Common Law rules of contract, of tort, of property, of marriage, of inheritance. It has recast the law of crimes and criminal procedure, not artistically or completely—indeed, very much the reverse—but sufficiently to give effect in substance to almost all the reforms which Bentham was advocating a century ago. It has remodelled the constitution as well as the procedure of the courts. It has never hesitated to do these things. But at the same time it has never considered the doing of them to be its main function. The bulk of its members are not really interested in technical questions of law, and would always prefer to let the lawyers develop their rules and procedure in their own way. The substantial business of Parliament as a legislature is to keep the machinery of the State in working order. And the laws which are required for this purpose belong to the domain, not of private or of criminal law, but of . . . administrative law. Take up a file of the public Bills for a session, or an annual volume of the public general statutes, and it will

<sup>1</sup> *Legislative Methods and Forms*, 209.

always confirm this statement. There will usually be a sprinkling of measures or proposed measures which, to use the language of legal journals, "are of special interest to the legal profession", but the proportion which these bear to the whole mass of Acts and Bills will be extremely small. The bulk of the Statute Book of each year will usually consist of administrative regulations, relating to matters which lie outside the ordinary reading and practice of the barrister. This has probably always been a characteristic of English legislation, but it has been so in a marked degree during the period which has elapsed since the Reform Act of 1832.<sup>1</sup>

In the domain, then, of private law, it is the Courts which are still predominant, both in affirming settled principles and in gradually adapting them to changing conditions. The position is well stated by Byrne J.:

'Mr. Challis is right of course when he says that "when any part of the common law is found to require amendment, the Legislature alone is competent to apply the remedy". But the Courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and to apply it to new and ever-varying states of facts and circumstances. The common law is to be sought in the expositions and declarations of it in the decisions of the Courts and in the writings of lawyers.<sup>2</sup> New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles.'<sup>3</sup>

#### IV. PRACTICAL VALUE OF PRECEDENTS

So long as we keep in view the main purpose for which the method of precedents exists, and do not allow it to become a mechanical expedient divorced from the living content of law, it is, and has proved itself to be in England, a most valuable instrument of jurisprudence. The Benthamite criticisms of it miss its purport. But it is not above criticism, for it does not operate without

<sup>1</sup> The remark is noteworthy as a comment on 'unauthoritative' sources.

<sup>2</sup> *Hollis's Hospital and Hague's Contract*, [1899] 2 Ch. 540, 552. Cf. Lord Esher M.R. in *Cochrane v. Moore* (1890), 25 Q.B.D. 57, 74.

Reports.

certain practical inconveniences. A precedent is not a precedent unless it is accurately reported. Attention has been already called<sup>1</sup> to the doubts and ambiguities which may arise out of questionable reports. The difficulty does not often arise in respect of modern reports, though even now Judges do not always conceal their scepticism concerning certain contemporary series;<sup>2</sup> but we are not yet independent of ancient reports, and here the value of precedents may vary greatly with the skill and reputation of the reporter. In the crabbed diction of Coke, a turn of phrase, a small omission, may lead to unfortunate misconceptions: for example, it would seem that the so-called Rule in *Pinnel's Case* (1602), 5 Co. Rep. 117—an artificial and groundless rule which has been consistently condemned<sup>3</sup>—arose out of just such a verbal ambiguity in Coke.<sup>4</sup> This inconvenience may be considered as diminishing with the improvement of reports; but *en revanche* we become threatened with a mass of precedents which, however illuminating in themselves, are of such formidable bulk and increase so rapidly that it is difficult to see how future generations of lawyers will cope with them. In the United States, the multiplicity of reports has already become a serious problem both of time and of space; and it is impossible to read modern English judgements without regretting the burden which is imposed on Judges by accumulations of precedents,

<sup>1</sup> *Ante*, p. 142.

<sup>2</sup> See James L.J., *In re Canadian Oil Works Corporation* (1875), L.R. 10 Ch. 593, 600; Bankes L.J., *Moore v. Landauer*, [1921] 2 K.B. 519, 523; and L. Q. R. xxxvii. 403.

<sup>3</sup> See note to *Cumber v. Wane*, 1 Sm. L.C. (12th ed.), 376.

<sup>4</sup> Ames, *Select Essays in Anglo-American Legal History*, iii. 259. For a recent example see *In re Adams*, [1922] P. 240, 242, and L. Q. R. xxxix. 12. On the many elements of confusion and error in the old reports see Veeder, 'The English Reports', *Select Essays in Anglo-American Legal History*, ii. 125 ff. See Cozens-Hardy M.R. and Hamilton L.J. on *Peto v. Blades* (1814), 5 Taunt. 657, in *Baylis v. Bishop of London*, [1913] 1 Ch. 127, 134, 140.

many of which have to be reviewed only to be discarded. Loosely drafted statutes do not lighten the burden.

Nor is it an entirely unjust criticism that precedents tend to make the development of the law depend on accidents of litigation. Important points may remain at large simply because nobody happens to have brought action upon them. An erroneous judgement may stand, and acquire an undeserved authority, merely because the losing party does not appeal against it—usually for the excellent reason that he cannot afford any further costs of litigation. Similar circumstances may arise many years later, and an appeal is brought which is in effect an appeal against the earlier decision; meanwhile, the profession has been following what turns out to be an incorrect rule.<sup>1</sup> In the case of a statute, it may not occur to anybody until many years after it has been passed to raise a point which may entirely alter its effect. We had a striking example of this a few years ago when the whole law of gaming and wagering was thrown into confusion by a new and ingenious point taken, in 1920, upon the Gaming Act of 1835.<sup>2</sup>

Accidents  
of litigation.

A more serious difficulty, and one likely to increase in future with the ceaseless growth of recorded cases, is that exact and comprehensive citation cannot be ensured. If the Judge is to be bound by precedents, he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search. He must depend largely on the assistance of counsel, and since the industry and acumen of the Bar also are fallible, it is not uncommon to find cases which might have

Over-  
looked  
authori-  
ties.

<sup>1</sup> e.g. *In re Tringham's Trusts* (1904), 2 Ch. 487, and *In re Bostock's Settlement*, [1921] 2 Ch. 469; *Bourne v. Keane*, [1919] A.C. 815; *In re Constable's Settled Estates*, [1919] 1 Ch. 178, and *Parr v. Att.-Gen.*, [1926] A.C. 239.

<sup>2</sup> *Dey v. Mayo*, [1920] 2 K.B. 346; *Sutters v. Briggs*, [1922] 1 A.C. 1; Gaming Act, 1922.

been decided otherwise, or are even overruled later, because pertinent decisions have not been taken into consideration.<sup>1</sup> It is not difficult to imagine that a Judge in, say, a hundred years' time will always feel a certain anxiety as to whether all the authorities have been before him ; and one cannot envy him his task in satisfying his conscience on the point.

Con- Sometimes, again, a Judge is in a dilemma between  
flicting what he conceives to be conflicting decisions in Courts  
'binding' of superior jurisdiction. Suppose the House of Lords  
authorities. has given a decision, and the same or a similar point subsequently comes before the Court of Appeal. Then it arises again before a single Judge and he is of opinion that the Court of Appeal has not truly ' followed ' the House of Lords. The decisions in both cases are ostensibly binding on him. Which is he to follow ?<sup>2</sup>

Com- But to the uncompromising critic like Bentham, all  
munis these objections are trivial compared with the main  
error indictment that, out of respect for precedent, a principle  
facit ius. of law may be followed which is known to be wrong, and that a Judge may be compelled to apply an established rule contrary to his own sense of justice. It is against this possibility that Continental systems particularly guard themselves ; and it must be admitted that in strict theory it is difficult to justify the doctrine *communis error facit ius*. Our courts do, however, admit this doctrine, though with caution, in the belief that unless the erroneous rule is working some manifest hardship, it is better not to interfere with it when it has been adopted as the basis of frequent transactions. ' If ', says Jessel M.R.,<sup>3</sup>

' I find a long course of decisions by inferior Courts acquiesced

<sup>1</sup> e. g. *Olley v. Fisher* (1886), 34 Ch.D. 367 ; *May v. Platt*, [1900] 1 Ch. 616 ; and *Craddock v. Hunt*, [1923] 2 Ch. 136. See Warrington L.J. on *Ex p. Price* (1875), L.R. 10 Ch. 648, in *In re City Life Assurance Co.*, [1926] Ch. 191, 207.

<sup>2</sup> e. g. Russell J. in *Sorrel v. Smith*, [1923] 2 Ch. 32.

<sup>3</sup> *Wallis v. Smith* (1882), 21 Ch.D. 243, 265.

in, which have become part of the settled law, I do not think it is the province of the Appeal Court after a long course of time to interfere, because most contracts have been regulated by those decisions. . . . There is another consideration which always has weight with me. When the law is settled it gets into the text-books, which are a very considerable guide to practitioners.'

The same authoritative Judge extends the principle even to erroneous interpretations of statute.

'Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs.'<sup>1</sup>

The 'mischief' in such cases is apparent enough, but it is a question whether it is not a greater mischief that error should become inveterate merely by antiquity; and it is difficult to set precise limits to the doctrine, for if it were carried to its logical conclusion, no long-standing precedent would ever be overruled, whereas this must sometimes be done *sans phrase*, whatever the 'daily dealings' of men have been.<sup>2</sup>

As an example of the awkward complexities which sometimes arise in the application of precedents, I will take a point which fluctuated in a curious manner in our Court of Probate for some seventy years. An Englishwoman marries a foreigner and lives with him abroad. She makes a will while domiciled in her foreign country of residence. According to a rule of Private International Law,<sup>3</sup> if this will is to be admitted to probate in England, it must be made in accordance

<sup>1</sup> *Exp. Willey* (1883), 23 Ch.D. 118, 127. 'I protest', says Lord Esher M.R. in *Robins v. Gray*, [1895] 2 Q.B. 501, 503, 'against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries.'

<sup>2</sup> e.g. *Bourne v. Keane*, [1919] A.C. 815.

<sup>3</sup> *Bloxam v. Favre* (1884), 9 P.D. 130.

with the law of the country of domicil. But now suppose that the woman has a power of appointment, by deed or by will, over property in England. Purporting to act in execution of the power, she makes a will, while still domiciled abroad, in the manner prescribed by the Wills Act, 1837, appointing the English property to certain uses. The question is whether this will can be admitted to probate. On the face of it, it cannot, in as much as it has not been made in accordance with the law of the country of domicil; but will it be saved from the operation of this rule by the fact that it is an execution of a power of appointment in accordance with English law? The Court of Probate merely has to decide the question of probate: whether or not the power has been properly executed is for the Court of Chancery. It is interesting to follow the different stages of the rule throughout the nineteenth century.

1. In 1838 the point came before the Judicial Committee in *Tatnall v. Hankey*, 2 Moo. P.C. 342. The Court of Probate had decided that it had no jurisdiction in such a case, as it could not consider questions of powers of appointment, which were for the Chancery. The Judicial Committee, as reported by Moore, held that the Court of Probate had jurisdiction, without giving any final judgement on the substantial point.

2. In 1846, in *Barnes v. Vincent*, 5 Moo. P.C. 201, Lord Brougham in the Judicial Committee expressed the opinion that probate ought not to be granted in such circumstances.

3. In 1859, in *Crookenden v. Fuller*, 1 Sw. & Tr. 441, the point came before Sir Cresswell Cresswell, though it was not the principal matter for decision. By way of dictum, the learned Judge said that probate ought not to be granted, despite the power of appointment, unless the will conformed to the law of domicil.

4. In the following year, Sir Cresswell Cresswell had to decide the point expressly in *In the Goods of Alexander*, 29 L.J. (P. & M.) 93. He revoked what

he had said in *Crookenden v. Fuller*, on the ground that the judgement of the Judicial Committee in *Tatnall v. Hankey* was not correctly reported by Moore. He preferred to rely upon the head-note to that case, and on a copy of the Judicial Committee's actual report made to the Crown, which was shown to him privately.<sup>1</sup> According to these statements of *Tatnall v. Hankey*, he held that the will ought to be admitted to probate and granted the application as prayed.

5. In 1865, the decision in *In the Goods of Alexander* was supported by a dictum of Lord Romilly in *D'Huart v. Harkness*, 34 Beav. 324, 328.

6. In 1866, the point arose before Sir J. Wilde (Lord Penzance) in *In the Goods of Hallyburton*, L.R. 1 P. & D. 90. The Judge there gave it as his opinion that Sir Cresswell Cresswell was right in his first decision in *Crookenden v. Fuller*, 'and that the note upon which he acted in the case of *Alexander*, of the decision of the Judicial Committee, which does not appear in the report in Moore, is at variance with the subsequent case of *Barnes v. Vincent*. Both *Tatnall v. Hankey* and *Barnes v. Vincent* appear to me to decide that where a will was executed under a power, the Court of Probate must determine whether or not there is a will.' This amounts to a clear opinion that the case of *Alexander* was wrongly decided. Nevertheless, the learned Judge followed the erroneous decision; for, he said, 'great injustice might arise if I were to do otherwise, because, for aught I know, the attorney who drew the will in this case may have acted on the authority of that very decision'.

7. So the matter stood for the next thirty years, until it arose again in 1896 in *In the Goods of Huber*, [1896] P. 209. The learned President (Sir F. H. Jeune) was clearly of opinion that Lord Penzance's criticism of *In the Goods of Alexander* was justified, and that that case could not be supported on principle or

<sup>1</sup> *Ante*, p. 148, n. 2.



authority. But he took the same view of his duty as his predecessor, and declined to dissent from a decision which, though plainly mistaken, had stood and had been acted on for thirty-six years.

8. Finally, in *Murphy v. Deichler*, [1909] A.C. 446, the point was brought for the first time before the House of Lords. A strenuous attempt was made to induce the House to overrule a decision of such doubtful antecedents. The Lord Chancellor dealt with the matter very shortly.

‘I think this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated.’

The result is that a decision given by a Judge on second (and worse) thoughts, based on a misapprehension of a report and contrary to two rulings of a higher tribunal, becomes ineradicably settled in the law.

Turning to another branch of the law, we find that conveyancing precedents sometimes establish rules of interpretation which are hard to justify in logic and which are regrettably effectual in defeating intention unless restrained by statute.<sup>1</sup> One conspicuous instance is the multitude of complex distinctions which have arisen in connexion with remainders limited ‘on failure of issue’. When a man by his will makes a gift to A for life, but if ‘he die without’ issue, or ‘without having’ issue, or ‘before he has any’ issue, then to B: it is difficult to doubt that he means that if A has no issue living at the time of his death, then the property is to go over to B. Now this was perfectly well recognized in the case of personal property, for the obvious reasons stated by Lord Macclesfield in 1719 in the leading case of *Forth v. Chapman*, 1 P. Wms. 663. With regard to *leaseholds* he says:

‘If I devise a term to A, and if A die without leaving issue,

<sup>1</sup> Cf. *post*, pp. 283 ff.

remainder over, in the vulgar and natural sense, this must be intended if A die without leaving issue at his death, and then the devise over is good; that the word "die", being the last antecedent, the words "without leaving issue", must refer to that. Besides, the testator who is *inops consilii*, will, under such circumstances, be supposed to speak in the vulgar common and natural, not in the legal sense.'

It was unfortunate for the testator that in respect of *freeholds*, his words were not deemed to be 'vulgar, common, and natural'; for out of a solicitude for the issue of the first taker of the freehold, there grew up a number of precedents which held that the words 'die without issue' might mean 'if he die *and his issue fail at any time after his death*'. This is one of the most remarkable instances in our law of the misuse of language, and its effect was, in the majority of cases, unless a clear contrary intention made this construction impossible, to give the first taken an estate tail and so nullify the wishes of the testator. Precedent confirmed precedent to this effect,<sup>1</sup> until s. 29 of the Wills Act, 1837, reversed the position and attached the natural meaning to the words unless it was excluded by a contrary intention.<sup>2</sup>

As a final example, I will take a rule which seems to be strangely at variance with the reasonableness underlying most Common Law principles of liability. Whence and by what means we acquired the doctrine *actio personalis moritur cum persona*, nobody has succeeded in discovering. We need not discuss the various theories as to its origin, since none of them so far has progressed beyond the stage of speculation; <sup>3</sup> whatever that origin may be, the rule itself has little to commend it, even in its restricted sense as applied to the transmissibility of actions to and against executors. One of

<sup>1</sup> A great many of the cases are collected in the note to *Forth v. Chapman*, *ubi sup.*, in Tudor's *Leading Cases in Real Property*.

<sup>2</sup> See Jarman on Wills (6th ed.), 1853, 1963 ff.

<sup>3</sup> See Goudy, 'Two Ancient Brocards', in *Essays in Legal History*, 1913 (ed. Vinogradoff).

our leading authorities on the law of torts describes it bluntly as 'a barbarous rule',<sup>1</sup> and few lawyers dissent from him. In the secondary meaning which has become attached to it, that 'damages cannot be recovered for the death of a human being', it reaches an even higher degree of unreason. This interpretation of it does not follow logically from the main rule, even if the main rule can be justified: and attention has often been called to the absurdity in which it results, namely, that a plaintiff can recover damages for harm wilfully or negligently done to his servant, but not if the harm results in death. The principle seems to be, the greater the damage, the less the compensation. The manner in which this anomaly rooted itself in our law is very curious. There is little doubt that after the time of Coke, the maxim *actio personalis moritur cum persona*, whether or not it had existed before, or was invented by Coke, became commonly accepted.<sup>2</sup> It may be that the secondary meaning of the rule also gained currency: possibly we are dealing here with one of the not uncommon cases of a rule known to the profession long before it receives judicial formulation. But there is no positive evidence that any rule that damages could not be recovered for death was ever laid down in terms until the case of *Higgins v. Butcher* (1606), Noy, 18.<sup>3</sup> Nor is it heard of again for more than two centuries, when Lord Ellenborough states it categorically in the well-known case of *Baker v. Bolton* (1808), 1 Camp, 493. This was a case at nisi prius, and Lord Ellenborough's judgement occupies only a few lines of print; and the whole report is meagre to a degree.<sup>4</sup> Never was an important principle of liability founded on such

<sup>1</sup> Pollock, *Torts* (10th ed.), 66. Cf. Salmond, *Torts* (5th ed.), 79.

<sup>2</sup> Goudy, *loc. cit.* 226.

<sup>3</sup> It is not without significance that Noy misunderstood the maxim and erroneously attributed it to Bacon: Goudy, *loc. cit.* The case is also reported in Yelverton, 89.

<sup>4</sup> See Bramwell B., *Osborn v. Gillett*, *ubi inf.*, at p. 96.

slender authority. The doctrine does not appear to have been raised again until 1873 in *Osborn v. Gillett*, L.R. 8 Ex. 88. It was vehemently attacked by Bramwell B., and it is not disrespectful to say that his reasoning carries far more conviction than that of the two other members of the Court, who upheld Lord Ellenborough's real or supposed principle on the unsatisfactory ground that there was no authority to the contrary. They were, however, also influenced by the fact that the doctrine had been indirectly recognized by Lord Campbell's Fatal Accidents Act. If the Court of Exchequer had taken a decided line in this case, the doctrine would probably have died there and then; but after a long interval, it again received express recognition from the Court of Appeal in *Clark v. London General Omnibus Co.*, [1906] 2 K.B. 648. The whole matter was reopened before the House of Lords in 1917 in *Admiralty Commissioners v. S.S. Amerika*, [1917] A.C. 38. The House refused to disturb a rule of such long, though insecure, standing. Their Lordships gave historical reasons for their decision, which, however, have been gravely doubted by eminent authority;<sup>1</sup> and the truth is that we are indebted only to a vicious antiquity for a rule which constitutes a serious anomaly in our law of civil wrongs, and which, as Sir Frederick Pollock says, 'has been made at all tolerable for a civilized community only by a series of exceptions'.<sup>2</sup>

Examples like these do arise from time to time in our law and are not inconsiderable criticisms of the operation of precedent. No system, however, can be entirely devoid of inconveniences, and it is the firm faith of English lawyers, not unjustified by age-long experience, that there are on the whole fewer inconveniences in the system as now established than would occur if every Court had a free hand to interpret the

General  
conclu-  
sions.

<sup>1</sup> Holdsworth, *H. E. L.* iii, App. VIII.

<sup>2</sup> *Torts* (10th ed.), 66.

law without the assistance of analogy. All in all, the amount of error and perverse doctrine which has been created by adherence to decisions is a microscopic fragment of an enormous legal system. Even when Judges follow precedents merely out of a sense of duty to the principle of judicial uniformity, they are often able to comfort themselves with the reflection that they are not thereby inflicting any great hardship on the public. 'Where it is quite clear that there is a mistake', says Blackburn J.,<sup>1</sup> 'we are not bound to follow a previous case; but we may act here on the maxim, "Communis error facit ius"; and I do so without much reluctance as no hardship will result to the pauper [in this case].' At the same time, we must not allow a Blackstonian optimism to blind us to remediable defects in a substantially sound system, especially in regard to those artificial 'rules of interpretation' which have wrought real hardship to the owners of property. Above all, we must not assign to precedent a sacramental magic in opposition to the principles of logic and justice.

#### SUMMARY

Reviewing our conclusions concerning precedent as a source of law: The process of judicial decision may be regarded as either deductive or inductive. In one view, the function of the magistrate is to deduce from a formulated general rule of law the principle applicable to the case before him. In the other view, the magistrate has to reason from particular cases to a general principle appropriate to the matter in hand. The former principle is characteristic of codified systems, the latter of English Common Law. In Roman jurisprudence, though the Orators include *res iudicata* among the sources of law, this is not precedent in the modern sense; there is no theory of 'binding' case-

<sup>1</sup> *Stourbridge Union v. Droitwich Union* (1871), L.R. 6 Q.B. 769, 775. To the same effect Cockburn C.J., S.C. On the 'communis error' in this case see *Dorking Union v. St. Saviour's Union*, [1898] 1 Q.B. 594.

law. The law of the praetors and of the jurisconsults was largely built up on cases, and the Bar did for the development of Roman case-law much the same as the Bench has done for English Common Law. It is possible that under the formulary system the non-professional *iudices* tended to develop a principle of judicial uniformity in some doctrines; probable that after the establishment of the *extraordinaria cognitio* the professional *iudices* did this in many departments of the substantive law; and certain that they did it in procedural law. Justinian expressly discountenanced the obligatory force of any decisions except those which emanated from the emperor himself. He strongly asserted as a general principle of decision, 'Non exemplis, sed legibus iudicandum est'. This was the general rule in regard to substantive law; but there is much evidence that a body of adjective law was influenced by and even founded on a *mos iudiciorum* or *observatio iudicialis*. Apart from this law of procedure, Roman jurisprudence admitted judicial precedent only as an indirect and limited influence on substantive rules, and not as a primary source of law.

In modern Continental systems, as exemplified by French law, there is a great deal of extra-judicial or jurist-made doctrine which is recognized as a necessary and constant factor in legal theory. The Judge is limited strictly to the case before him and is not permitted to lay down any 'general disposition'. In practice, recorded precedents assert a considerable influence, which may be said to be on the increase. In some cases, express provisions of the Code have been virtually nullified by a line of decisions. But there is no absolute uniformity; and though there is a marked tendency thereto in practice, French theory insists strongly on the independence of all Courts, of whatever degree, in deciding cases according to principle and not necessarily according to example. After a number of experiments, the final Court of Appeal, the Cour de

Cassation, has been given a jurisdiction of last resort in certain circumstances, but even the final judgements of this Court, though greatly respected in practice, are not in theory binding on any Courts for future cases.

In English law, the habit of 'noting' decisions seems to have arisen very early in the legal profession. Bracton lays down certain principles for judicial uniformity, and was himself an industrious collector of cases, many of which served as material for his institutional treatise. By the thirteenth century, the Judges show a distinct desire to tread the beaten path. In the Year Books, although citation of specific cases by name is infrequent (being at this period difficult and nearly impossible) there is considerable evidence that both Judges and counsel frequently reasoned by the analogy of previous decisions, for the most part drawing upon their personal recollection or possibly upon private notes. But there is no trace of a doctrine in the Middle Ages that precedents were 'binding', and if a Court considered an alleged decision to have been ill-founded, it had no hesitation in rejecting it. At the same time, there is an unmistakable consciousness on the part of Judges that their decisions are helping to settle the law for the future; and on occasion they do not hesitate to say so. In the sixteenth century, with Dyer's reports, a system of citations begins to be consolidated on well-recognized lines, and this system may be said to have been finally established by Coke. Many of the 'precedents' of the sixteenth and seventeenth centuries are precedents of pleading and practice rather than of substantive law; and these possessed a peculiar stringency. But the importance of substantive precedents is not ignored. In the latter half of the seventeenth century, Vaughan C.J., C. P., lays down certain principles as to the relative values of different kinds of precedents. While fully conscious of the importance of case-law, he is clear that 'if a Court give judgement judicially, another Court is not bound to give like judgement,

unless it think that judgement first given was according to law'. He even denies the force of procedural precedents unless they are 'according to law'. Sir Matthew Hale was of much the same opinion. In the eighteenth century, precedents play a large part in the practice of the law, but the Judges do not consider themselves in any way bound by decisions of which they do not approve. By the end of the eighteenth century there were conflicting views as to the authority of precedent, and no clear theory seems to have been settled ; but the general attitude was that while precedents were entitled to all respect as illustrations of particular points of law, they contained no inherent authority as against considerations of justice and general legal principle. A change gradually takes place in the first half of the nineteenth century, and by 1833 it is recognized that the decisions of higher tribunals are binding on lower tribunals, unless 'plainly unreasonable and inconvenient', and that no Judge is at liberty to depart from a principle once laid down merely on the ground that it is not 'as convenient and reasonable as he himself could have devised'. In the latter half of the nineteenth century, the hierarchy of authority becomes settled and the general rules for the application of precedents are now universally recognized.

These rules are that : (1) Each Court is bound by the decisions of Courts above it and the House of Lords and (*semble*) the Court of Appeal are bound by their own decisions. (2) Any relevant judgement of any Court is a strong argument entitled to respectful consideration. (3) A judgement is authoritative only as to its *ratio decidendi*. (4) A precedent is not abrogated by lapse of time. (5) But very ancient precedents are not in practice commonly applicable to modern circumstances. (6) A precedent may be cited from any source which the Court considers reliable, but the Reports of the Incorporated Council of Law Reporting for England and Wales enjoy peculiar authority.



The only use of precedents is to establish principles. A distinction is sometimes drawn between 'legal' and 'historical' precedents, but it is misleading and unnecessary in the actual working of precedents in the Courts. The judgements of English Courts stand in a peculiar position as the most decisive authorities which can be cited; but other decisions and opinions are integral parts of forensic dialectic if relevant to a general proposition of law. Thus French writers and Roman Law have had an important influence on some branches of our law. English rules of Private International Law have been constructed largely on the opinions of jurists. The law of Real Property has been greatly affected by the practice of conveyancers. Text-books have enjoyed high esteem in our Courts. The principle of legal argument is not some esoteric magic peculiar to a particular profession, but is a principle of ordinary logical demonstration. In order to arrive at the appropriate principle, counsel may use any material which is *ad rem*; but among this material the analogy of decided cases is the most convincing. This is as true of judgements as of argument, for judgements are logical expositions of principles, based in the same way on any relevant material. The Judge is 'bound' by authority only according to his own lights, i. e. according as he himself considers the precedent cited to him to be analogous to the circumstances in issue. Hence the application of precedents can never be made mechanical. Over and above all particular precedents stand certain cardinal principles of the Common Law, and decisions, however deliberately made, which run counter to these principles possess at best an ostensible authority which they soon lose either by the process of 'distinguishing' or by being expressly overruled. The essential function of the Judge is to find and uphold not only these fundamental technical principles of law, but the general administration of justice. Therefore in cases to which no specific decisions apply, he

has recourse to natural justice, reason, morality, and social utility. These general ethical principles, though they cannot avail against express decisions (and express decisions seldom conflict with them), have played a large part in the development of our Common Law, and are still indispensable to it.

The English system of precedents, being so deeply rooted in our law, is often referred to as 'judge-made law'. This term, though it contains a partial truth, is somewhat misleading. There are some cases 'of first impression' in which the Judge can find no specific authority to guide him, and here he has to 'make' a rule for the first time. But even in these cases the Judge decides upon considerations which his technical training lead him to believe are consistent with general principles of English law. He applies a technically trained sense of right. In the vast majority of cases which are directly or indirectly governed by decisions, the Judge does not 'make' a rule as an act of original creation. He is limited in his material; he can only work upon that which exists in the present or the past; he does not consciously project a rule into the future, but applies what he conceives to be an existing rule to a concrete case. In this respect his powers are quite different from those of the legislator, in the proper sense of that term. His function is to interpret, not to legislate; but in the process of interpretation he inevitably and fundamentally affects the development of the law. He 'makes' law only in a secondary or derivative sense; but the formative effect of his interpretation on all the most essential principles of law is of the highest and most lasting importance.

Precedent, restrained to its proper use and understood as an instrument of logic, has proved itself one of the most valuable factors in our legal reasoning. But it has certain disadvantages and inconveniences. The variety and sometimes the deficiencies of the reports of cases may lead to ambiguities or serious

errors. Case-law is irregular in its operation, since it must depend on the accidents of litigation. There is no certainty that the Judge, in arriving at his decision, has considered all the relevant authorities; and with the increase of reports, it becomes more and more difficult for him to do so. Sometimes a conflict, or supposed conflict, between two higher authorities places a single Judge in a dilemma. Erroneous decisions, though indefensible on principle, may sometimes establish themselves in the law either by uncritical acquiescence, or because they are never challenged in superior Courts; and the principle *communis error facit ius*, while it is convenient and while it probably does not work much actual hardship, is open to grave dangers. But these weaknesses, though considerable, do not outweigh the substantial merits of the system of precedents as practised in our law; and the amount of irrationality introduced into the law by certain inevitable difficulties of application is inconsiderable beside the solid and rational jurisprudence which the Common Law, built up on example and analogy, has erected to so high a position in European civilization.

# V

## EQUITY

### I. LAW AND JUSTICE

IT is only since rules of law have become multiform through long processes of synthesis that law and justice have been conceived, as they are still sometimes conceived, as belonging to two distinct spheres. It would never have occurred to a political theorist in the Middle Ages to doubt that the whole aim of law was approximation to ideal justice, or to regard particular laws merely as rules of thumb for the mechanical regulation of society.<sup>1</sup> It was because they found in human law an aspiration towards ideal justice that the men of the Middle Ages were so deeply concerned with the Law of Nature. It has become the fashion to treat their speculation as chimerical fantasy; that it was much more than that is sufficiently shown by the influence of the Law of Nature on subsequent theory and practice. If medieval doctrines in this kind were vague and mystical, yet they contemplated an ideal with which the world cannot yet dispense. Our methods to-day are more empirical and less abstract; but if modern lawyers rightly distrust generalizations about natural justice and 'justice as between man and man',<sup>2</sup> that is only because in the process of time most of our rules of law have shaped themselves as justice and utility demand, and it is not usually necessary to travel beyond settled doctrine to an unsettled hypothesis. But in the past, the striving after principles of natural fairness has been a supremely important part

<sup>1</sup> Carlyle, *Mediaeval Political Theory in the West*, ii. 1 f., iii. 183.

<sup>2</sup> See, e. g., Lord Sumner (then Hamilton L.J.) in *Local Government Board v. Arlidge*, [1914] 1 K.B. 160, 199 ff., and in *Sinclair v. Brougham*, [1914] A.C. 398.

in legal developments. Equity has been, as Maine called it, a kind of 'supplementary or residuary jurisdiction' without which law would have been fatally stunted.

But since justice is the aim of law, why should not law be sufficient unto itself? Whence the necessity for any supplementary or residuary jurisdiction?

Necessity  
for a  
jurisdiction  
supplementary  
to law.

A legal rule, like every kind of rule, aims at establishing a generalization for an indefinite number of cases of a certain kind. Uniformity and universality are essential qualities of it. To the quality of uniformity there can be no exception; a rule cannot be expressed in different forms having different meanings, otherwise it is not a rule; though it may be expressed, as legal rules often are, in different forms having the same meaning. The essential meaning and intention of the rule must be uniform. To the quality of universality there may be apparent exceptions; many laws seem at first sight to apply only to a limited section of the community. In reality, their application is universal, for though they may not affect the interests of all citizens equally, they are binding upon all citizens equally. A mariner's legal duties while on the high seas may seem to have little application to a landsman; but if the landsman happens to be a passenger on a ship, maritime law may at any moment have a very real meaning to him, either if his safety is imperilled by the mariner's neglect of duty, or if he attempts to interfere with the proper execution of that duty.

But no generalization can be completely general. The trite phrases that there are exceptions to every rule, or that the exception proves the rule, are only other ways of saying that human calculation is imperfect and human reason limited. In a great many of our rules the exceptions do not gravely disturb us: we are not shaken in our conviction that the dog is a four-footed animal because one dog happens to be born with three legs. Nor are we seriously disconcerted because

many of our working conventions are admittedly imperfect approximations; the science of geometry is not thrown into confusion because no straight line can be perfectly and ideally straight and no parallel lines perfectly and ideally parallel. But in the domain of law the effect of exceptions may be more detrimental. Law and justice exist for the regulation of actual rights and duties; and the incompleteness of the generalization which is certain to make itself felt at some point or other, may produce results which are antithetic to the very purpose of the generalization.

In nearly all legal systems, therefore, a discretionary or moderating influence has been superadded to the rigour of formulated law. It has assumed different names at different times, but we may consider it under the general description of equity. It has exhibited itself in two principal forms: (1) a liberal and humane interpretation of law in general, so far as that is possible without actual antagonism to the law itself—this we may call equity in general; (2) a liberal and humane modification of the law in exceptional cases not coming within the ambit of the general rule—this we may call particular equity.<sup>1</sup>

*General Equity*  
*Particular Equity*

It is the latter aspect of equity which raises the most difficult problems. Where a rule works hardship in a particular case, it is not only pardonable, but it is necessary to ask, is it not *eo ipso* a bad rule? Not infrequently it is proved to be so, and in the light of the 'glaring case' it stands self-condemned. A change must then be made, and it is by this somewhat painful process of trial and error that a great many necessary reforms in all legal systems have been effected—formerly by fiction, when legislation was less sensitive

How far  
 legal rules  
 can admit  
 excep-  
 tions?

<sup>1</sup> Cf. Cic. *Partit.* 37, 130: 'Aequitatis autem vis est duplex: cuius altera directo et veri et iusti, et, ut dicitur, aequi et boni ratione defenditur; altera ad vicissitudinem referendae gratiae pertinet.' Cf. Pollock, 'The Transformations of Equity', *Essays in Legal History*, 1913 (ed. Vinogradoff), 287.

to social needs than it is to-day; in modern times by legislation, if and when an overworked legislature can be stimulated into action.

But there are many circumstances in which, though the lot of the individual litigant seems hard, it is neither possible nor desirable to abrogate the general rule. It is impracticable to avoid such unfortunate incidents without abandoning all uniformity in favour of mere caprice and disorder. In such circumstances, the law and lawyers often have to bear hard words. Too frequently the layman, loud in his condemnation of 'flagrant injustice', will not attempt to look beyond the particular to the general, which it is exactly the business of the lawyer to do, and which must be done by somebody, if society is not to fall to pieces. Too often the law is denounced in the same manner as the whole science of surgery might be denounced because a single patient dies under the knife. It must be admitted—and it is a source of genuine regret to every lawyer who respects his profession—that the law, like surgery, 'loses' a certain number of patients; but its instrument is not, as some seem to think, that of the butcher, but of the healer.

Yet the lawyer cannot afford to be contemptuous of the average sense of justice in the average man; for if he has a sense of proportion, the lawyer is aware of the peculiar danger to which he himself is liable—that in the honest pursuit of scientific logic he may forget the relative importance of form and content. The history of law shows only too clearly and too often how easy it is for the lawyer to succumb to his besetting sin of formalism.

The  
natural  
sense of  
justice.

He is sceptical of the native sense of justice in the uninstructed mind because his training has made him aware that the theory and practice of justice are not acquired solely by the light of nature. No riddle is more difficult to solve, none has more persistently engaged the attention of thoughtful minds; and those

who ignore the difficulties do so out of the abundance of their ignorance. 'But how can you love justice', asks Fortescue,<sup>1</sup> 'unless you first have a sufficient knowledge in the laws, whereby the knowledge of it is won and had, for the Philosopher saith, that nothing can be loved except it be known. . . . As for that which is unknown, it is wont not only not to be loved, but also to be despised.

*Omnia quae nescit spernenda dicit colonus.'*

'He alone', says Rudolph Sohm,<sup>2</sup> 'can claim to have obtained a real vision of law, of justice and of injustice, to whom life has revealed itself in its fullness. It is, of course, true of jurisprudence as it is of other sciences that the knowledge it commands is, and will remain, fragmentary. But it has a lofty aim in view to which it must strive, with unremitting endeavour, to approach as nearly as may be.' If truth lies at the bottom of a well, so does justice, and it will be found only by those who know how to swim, not by those who throw themselves in at a venture. Nothing is more treacherous than popular justice in many of its manifestations, subject as it is to passion, to fallacy, and to the inability to grasp general notions.

Nevertheless, the 'natural sense of justice' and of liberal, intelligent justice—or what has been called *vulgaris aequitas*<sup>3</sup>—is not a meaningless term. All law must postulate some kind of common denominator of justice in the community. There is no meaning in any legal system unless it be so. Infinite though the variations of subjective opinion may be, it needs no dialectic to maintain that there is in man a fundamental sense of justice which no law dare flagrantly transgress.

<sup>1</sup> *De Laud.*, ch. 3.

<sup>2</sup> *Institutes of Roman Law*, § 8, p. 31.

<sup>3</sup> For examples see Voigt, *Ius Naturale, Aequum et Bonum u. Ius Gentium*, i. 37 ff. Prof. de Zulueta reminds me that the adjective appears as *rudis*, as opposed to *constituta*, in Martinus's gloss on C. 2. 1. 1; see Savigny, *Gesch. des röm. Rechts im Mittelalter*, iv. 486 f.



It is upon some such primary sense of justice that a great deal of early law—not merely what we have come to recognize as equity—is founded. Customary law can do no more than establish the general rule: it necessarily leaves many contingencies unprovided for. When the lawgiver begins to interpret custom, he must be guided by a native sense of justice in the actual application of the law; and he is a lawgiver exactly because he possesses the instinct of justice in a higher degree than the majority of his fellows. One of the first necessities imposed upon him is to administer law in that spirit of humane interpretation which has been called *equity in general*.

## II. PHILOSOPHICAL CONCEPTION OF EQUITY

1. *Equity  
in Greek  
law.*

This conception found full and repeated expression in the Greek philosophers and orators. To consider the Greek view of justice in general, especially as discussed by Plato and Aristotle, would take us too far afield; <sup>1</sup> it may not, however, be irrelevant to our purpose to make a brief reference to the general principle of fairness or equity (*ἐπιείκεια*), which is highly characteristic of Greek philosophy and law. The essence of the conception is expressed in a well-known passage in Plato. Plato's *Statesman*: <sup>2</sup>

'*Stranger*. There can be no doubt that legislation is in a manner the business of a King, and yet the best thing of all is not that the law should rule, but that a man should rule, supposing him to have wisdom and royal power. Do you see why this is?

*Young Socrates*. Why?

*Stranger*. Because the law cannot comprehend exactly what is noblest or most just, or at once ordain what is best, for all. The differences of men and actions, and the endless irregular

<sup>1</sup> A thorough but somewhat prolix examination of the theory of *ius naturale*, with which *aequitas* and *ἐπιείκεια* are intimately connected in Greek philosophy, is to be found in Voigt, *op. cit.*

<sup>2</sup> 294 a. Jowett's translation.

movements of human things, do not admit of any universal and simple rule. No art can lay down any rule which will last for ever—that we must admit.

*Young Socrates.* Certainly.

*Stranger.* But this the law seeks to accomplish; like an obstinate and ignorant tyrant, who will not allow anything to be done contrary to his appointment or any question to be asked—not even in sudden changes of circumstances, when something happens to be better than what he commanded for some one.

*Young Socrates.* True; that is just the way the law treats us.

*Stranger.* A perfectly simple principle can never be applied to a state of things which is the reverse of simple.'

Plato is here perhaps a little hard on the *ius strictum*, but expresses the root idea of *ἐπιείκεια*—that it is a necessary element supplementary to the imperfect generalizations of legal rules.

The notion was more fully examined by Aristotle in the tenth chapter of the fifth book of the *Ethics*, and as this is the most important surviving discussion of *ἐπιείκεια*, I venture to quote it almost in full: <sup>1</sup> Aristotle.

'Our next subject is equity and the equitable,<sup>2</sup> and their respective relations to justice and the just. For on examination they appear to be neither absolutely the same nor generically different; and while we sometimes praise what is equitable and the equitable man (so that we apply the name by way of praise even to instances of the other virtues, meaning by *ἐπιεικέστερον* that a thing is better), at other times, when we reason it out, it seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same.

'These, then, are pretty much the considerations that give rise to the problem about the equitable; they are all in a sense correct and not opposed to one another; for the equitable, though it is better than one kind of justice, yet is just, and it

<sup>1</sup> Ross's translation.

<sup>2</sup> *ἐπιείκεια* and *τὸ ἐπιεικές* throughout. The reader need not be reminded that 'equity' is not here used in the purely technical sense which it has acquired in English law. 'Justice' and 'the just' are *δικαιοσύνη* and *τὸ δίκαιον* throughout.

is not as being a different class of thing that it is better than the just. The same thing, then, is just and equitable, and while both are good the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction [*ἐπανόρθωμα*] of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality.<sup>1</sup>

Here Aristotle was conscious of a difficulty which was not present to Plato, a difficulty in logic and a danger in practice. Logically—if law is justice, as it ought to be, why is any further element of justice necessary as a supplement? Practically—how reconcile the general authority of a law with individual relaxations of it? The answer is found in this, that the supplementary equitable interpretation should be *in the spirit of the law itself*, doing that which the law would have done if it had envisaged this particular case. Thus we have an early anticipation of the principle 'Equity follows the law': we shall observe the same principle at work in the interpretation of statutes;<sup>2</sup> and we may remark at once that the principle leaves many doubts open and has sometimes led to refine-

<sup>1</sup> *Post*, pp. 278 ff.

ments which border very closely on fiction. We are on slippery ground when we speak of doing that for the law which the law has not done for itself; and the principle of equity following the law has, in common experience, sometimes meant that equity follows at such a respectful distance that the law is quite lost to view, or else strides out so boldly that it outstrips, not to say outwits, the law.

Aristotle's view centres in *particular equity*, and he finds the chief function of ἐπιείκεια to consist in supplying the deficiencies of νόμος. He epitomizes his doctrine in the last phrase of the passage cited: καὶ ἔστιν αὐτῇ ἡ φύσις ἡ τοῦ ἐπιεικοῦς, ἐπανόρθωμα νόμου, ἣ ἑλλείπει διὰ τὸ καθόλου. Elsewhere he speaks in more general and idealistic terms of the nature of ἐπιείκεια as *equity in general*. In the *Rhetoric*,<sup>1</sup> after advancing the same general observations as in the *Ethics*, he continues: <sup>2</sup>

‘It is equity to pardon human failings, and to look to the lawgiver and not to the law; to the spirit and not to the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run and not in the present moment (μηδὲ ποῖός τις νῦν, ἀλλὰ ποῖός τις ἦν αἰεὶ ἢ ὥς ἐπὶ τὸ πολὺ); to remember good rather than evil, and good that one has received rather than good that one has done; to bear being injured (τὸ ἀνέχεσθαι ἀδικοῦμενον); to wish to settle a matter by words rather than by deeds;<sup>3</sup> lastly, to prefer arbitration to judgement, for the arbitrator (διαιτητής) sees what is equitable, but the judge only the law, and for this an arbitrator was first appointed, in order that equity might flourish.’

A little later,<sup>4</sup> equity is described as eternal and

<sup>1</sup> i. 13. 1374 a.

<sup>2</sup> *Ibid.* 1374 b; Grant's translation, *apud Eth. Nic.*, note to v. 10. 1.

<sup>3</sup> A somewhat dark saying, and, some may think, a reflection of the peculiar genius of the Greeks for talking; but λόγος here seems to mean ‘openness to persuasion’ as opposed to ἔργον, standing on one's rights without listening to the voice of sweet reasonableness.

<sup>4</sup> i. 15. 1375 a.

immutable: τὸ μὲν ἐπιεικὲς ἀεὶ μένει καὶ οὐδέποτε μεταβάλλει. So, above all the inelegances of positive law, 'The one remains, the many change and pass.'<sup>1</sup>

Practical  
applica-  
tion of  
equity in  
Greek law.

These doctrines were by no means unpractical abstractions in Greek law. The division of law into written and unwritten law (τὸ γεγραμμένον and τὸ ἄγραφον) was an axiom of Greek jurisprudence, and ἐπιείκεια was a definite, recognized, and operative part of the ἄγραφον. It is a little difficult for the modern lawyer to reconcile himself to the Orators' continual vague appeals to the unwritten law; the dangers of subordinating positive law to a moral principle, which must partake largely of the subjective, are self-evident. The pleader who relies on natural equity is always open to the suspicion that he does so because he has nothing more substantial to assist him. Equity may easily become a *pis aller*; and it is difficult to resist the belief that in the hands of the Orators forensic exigencies frequently lent it an undue elasticity. But it is a mistake to judge a system of law by forensic exigencies. We pride ourselves in England that our law is strict and impartial; but if half the speeches addressed to juries were recorded and read by a foreigner, he would form a very strange idea of our jurisprudence. Making all allowances for that emotionalism which more than one incident in the history of Athens revealed in startling manner, it is unreasonable to suppose that Athenian Courts regarded all the excesses of pleaders as a sober statement of legal principles; otherwise a very elaborate and complex structure of law, such as the Athenian system undoubtedly was, becomes an inexplicable contradiction. Despite rhetorical hyperbole, equity remained a real, indispensable factor in the Greek conception of the administration of justice.<sup>2</sup> Its practical sphere of operation was found chiefly in the interpretation of wills, in the preservation of good faith

<sup>1</sup> On ἐπιείκεια in Aristotle see further Voigt, *op. cit.* iv. 2, 372 ff.

<sup>2</sup> Vinogradoff, *Historical Jurisprudence*, ii. 66.

in contracts, and in the liberal interpretation of archaic or obscure statutes. Over and above these special departments of law, there was a general residuary justice, or prerogative, in the sovereign people of which the higher Athenian Courts were in theory and in practice the representatives *ad hoc*.<sup>1</sup>

To what extent Roman jurisprudence was influenced by Greek philosophy and rhetoric has been a debated question. It is no longer doubted by modern students of Roman Law that the influence of Greece from the time of the Twelve Tables was, to put it at the lowest, real and considerable.<sup>2</sup> It is beyond doubt that some knowledge of Greek culture and thought was not only an indispensable part of the equipment of every well-educated Roman, but that it attracted the particular attention of the *veteres* who founded the tradition of classical Roman jurisprudence; and we have the evidence of Cicero that some of the more distinguished of this 'old school' studied under Stoic teachers.<sup>3</sup> That this early philosophic attitude towards jurisprudence maintained its influence throughout the classical period is sufficiently shown by the fact that some of the most unquestioned conceptions of law and justice in the Corpus Iuris still bear the unmistakable stamp of Greek philosophical commonplaces.<sup>4</sup>

2. *Equity in Roman Law.*

Influence of Greek philosophy.

<sup>1</sup> *Ibid.*

<sup>2</sup> Cuiq, *Institutiones Juridiques*, 10, &c., represents the characteristic modern view.

<sup>3</sup> *Ibid.*; see references there cited, 40 (4). Cf. *Brut.* xli. 152: 'Sic enim . . . existimo, iuris civilis magnum usum et apud Scaevolam, et apud multos fuisse; artem, in hoc uno: quod nunquam effecisset ipsius iuris scientia, nisi eam praeterea didicisset artem, quae doceret rem universam tribuere in partes, latentem explicare definiendo obscuram explanare interpretando; ambigua primum videre, deinde distinguere; postremo habere regulam, qua vera et falsa iudicarentur, et quae, quibus positae, essent, quaeque non essent consequentia. Hic tamen attulit hanc artem omnium artium maximam, quasi lucem, ad ea quae confuse ab aliis aut respondebantur aut agebantur.'

<sup>4</sup> e. g. the dichotomy of written and unwritten law, the famous *tria praecepta iuris*, the definitions of *sapientia*, *iurisprudentia*, and *iustitia*,

Equity a  
practical  
element in  
Roman  
Law.

It is as easy as it is unwise to exaggerate Greek influence, especially in the development of the praetorian *ius gentium*, for there is no reason to suppose that the Romans were incapable of forming a conception of *aequitas* for themselves. Yet it is not a little surprising to find, in a system so absolute, comprehensive, and explicit as the Roman, especially as codified by the authority of the supreme lawgiver, the conception of *aequitas* or *aequum et bonum* so firmly embedded. To regard it as a mere vague counsel of perfection with little practical application, is entirely inconsistent with the evidence of the Corpus Iuris.<sup>1</sup> Nor was it introduced by a side-wind through the practice of the Courts as against the strict theory of the imperial law. Not only is it not discountenanced, as future juristic interpretation and 'judge-made law' were discountenanced,<sup>2</sup> by the sovereign, but in the fourth century A. D. it is expressly enjoined by imperial legislation<sup>3</sup> as a positive duty of the Judge: 'Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem.' It is impossible to imagine a wider charter to equity than this. Nor were the doctrines of *aequitas* expressed only in sweeping generalities. Our English system of equity has developed many doctrines of a particular technical rather than a general moral significance; yet not a few surprising affinities exist between Roman and English technical principles of this kind, as has been shown by Professor Buckland in the numerous ingenious parallels which he has instituted between the two systems.<sup>4</sup>

Chief  
equitable  
principles  
of Roman  
Law.

Beyond these technical rules it is possible to distinguish certain general principles of equity which profoundly influenced Roman Law in many of its branches.

and (perhaps more doubtfully) the delimitation of *infantia et pubertas*: Voigt, *op. cit.* i. 257.

<sup>1</sup> Cuq, *op. cit.* 44.

<sup>2</sup> *Ante*, p. 112.

<sup>3</sup> Constantine and Licinius, A. D. 314: C. 3. 1. 8; cf. C. 3. 38. 12.

<sup>4</sup> *Equity in Roman Law*, *passim*.

Under the various titles of *aequitas*, *aequum et bonum*, *utilitas*, *humanitas*, *benignitas*, *ratio naturalis*, and in a great measure *bona fides*, it appears almost everywhere; but it may be said to have exerted its chief influence in the following principles of Roman jurisprudence:

1. In the triumph of the natural idea of blood relationship over the artificial idea of agnation. This principle, it may be thought, was almost inevitable in the natural evolution of Roman society; but when one considers how profoundly patriarchal that society was in its origin and structure, the victory of cognation, based on a principle variously called *sanguinis ratio*,<sup>1</sup> *caritas sanguinis*,<sup>2</sup> or *humana interpretatio*,<sup>3</sup> appears as no mean achievement of juridical development. Its scope and effects are too well known to need comment: it was the source of the whole system of praetorian succession, of such enactments as the SC. Orphitianum and SC. Tertullianum, and of Justinian's final settlement of the law of succession. It affected the law of testate as well as intestate succession, as the Lex Falcidia and the *querela inofficiosi testamenti* bear witness.

2. The development of the principle of *good faith* in contractual obligations. The whole conception of a pact is based by Ulpian on *aequitas naturalis*: 'quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt servare?'<sup>4</sup> The tendency throughout the whole history of Roman contract is from the formalistic towards the consensual; and the recognition of a large and important class of agreements, common in daily life, of which *bona fides* is a necessary element, opens up a wide discretion to the Judge. The same discretion is exercised in applying the *exceptio doli* to *actiones stricti iuris*, *aequitas* being the natural antithesis

<sup>1</sup> D. 38. 8. 2.

<sup>2</sup> D. 25. 3. 5. 2.

<sup>3</sup> D. 38. 17. 1. 6. Other leading passages are: D. 37. 1. 6. 1, 5. 1 pr., 11. 2 pr.; D. 38. 16. 1. 4, 17. 5 pr.; D. 48. 20. 7 pr., 23. 4 Cf. Gai. *Inst.* iii. 7, 18-24.

<sup>4</sup> D. 2. 14. 1 pr. Cf. D. 46. 3. 95. 4.



of *dolus*.<sup>1</sup> The *naturalis obligatio* is also a well-established conception, and the obscure doctrine of *causa civilis* becomes artificial and almost fictitious beside the fundamental requirement of good faith. Further, the praetor travels outside the *ius strictum* to find new and necessary forms of obligation where the civil law supplies none.<sup>2</sup> The governing principle becomes *grave est fidem fallere*.<sup>3</sup>

3. Akin to the principle last mentioned, a dogma of interpretation that wherever possible the intention rather than the form should be looked to. This is not only inherent in consensual obligations,<sup>4</sup> in the same degree as the requirement of good faith, but is to be regarded in the performance of any juristic act—e. g. the transfer of property:<sup>5</sup> it is a safeguard against inadvertence and innocent mistake—e. g. in verbal contract<sup>6</sup> or in the release of a debt.<sup>7</sup> If it may be prayed in aid by those who are living and able to explain themselves, *a fortiori* it must be applied in interpreting the intentions of the dead. Hence, as in Greek law<sup>8</sup> and to a large extent in modern law, we find the principle invoked chiefly in the interpretation of testaments.<sup>9</sup>

4. There is no principle of equity which appears

<sup>1</sup> D. 44. 4. 12. Cf. D. h. t. 1. 1.

<sup>2</sup> e. g. *actiones adiecticiae qualitatis*: see Gai. *Inst.* iv. 71.

<sup>3</sup> D. 13. 5. 1 pr. 'But with regard to the consequences involved in the abstract conception of ownership or of liability, its [sc. Roman jurisprudence] natural instinct was never at fault for a single moment. And nowhere was this unique power more conspicuously displayed than in the way the Roman jurists, so to speak, hit upon the precise requirements of *bona fides* in human dealings and applied them to individual cases. In such transactions, for instance, as sales, agreements to let and hire, agencies, &c., they seemed to know at once, and instinctively, what it was that the nature of the circumstances themselves required, in all cases and in each separate case, quite apart from any explicit declaration of intention on the part of the persons concerned': Sohm, *Institutes of Roman Law* (2nd ed.), 106.

<sup>4</sup> Gai. *Inst.* iii. 137.

<sup>5</sup> D. 41. 1. 9. 3.

<sup>6</sup> D. 45. 1. 36. <sup>7</sup> D. 20. 6. 8. 16.

<sup>8</sup> See *ante*, p. 204.

<sup>9</sup> D. 28. 2. 13 pr., 3. 17; D. 35. 2. 88. 1; C. 6. 24. 6.

more frequently in Roman Law, and in more diverse connexions, than the prohibition of unjust enrichment at the expense of another. He who has come into possession of property not his own, even though the acquisition may have been made accidentally or by mistake and without deliberate fraud, is under a strict obligation to return it or its value to the true owner. This was the foundation of the important action of *condictio indebiti* and in the main of the praetor's wide discretionary remedy of *in integrum restitutio*. Among innumerable statements of the principle in the Corpus Iuris, the most succinct and characteristic is that of Pomponius:<sup>1</sup> 'Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiores.' Cicero<sup>2</sup> regards the principle as essential to the very existence of society, and the negation of it as more subversive than any other detriment which could befall body or estate. It was, indeed, the natural corollary of *suum cuique tribuere*.

5. Repeatedly the spirit of *aequitas* is opposed to *dolus malus*, and one form of *dolus malus* is *subtilitas*, or adherence to the strict letter of the law, in order to make it the means of an unscrupulous advantage. The essence of the wrong complained of is not that it is illegal, but that it is too legal. Undoubtedly the Judge here looks beyond legal right to *motive*, and it was not questioned that it was his duty as well as his right to do so. This principle of the *abuse of right* is expressed in modern continental systems as *chicane*, and is a perfectly well recognized form of civil wrong. Except for certain somewhat hesitating doctrines of equity, modern English law is unable to carry judicial discretion so far.<sup>3</sup> In Roman Law, it was the *nimia*

<sup>1</sup> D. 50. 17. 206. Other general statements in D. 23. 3. 6. 2 and D. 47. 4. 1. 1. Cf. D. 12. 1. 32, D. 22. 1. 38. 7, and D. 47. 2. 63. 5.

<sup>2</sup> *De Off.* iii. 5. 21 (somewhat rhetorically stated).

<sup>3</sup> See 'Legal Morality and the Ius Abutendi', by the present writer, in *L. Q. R.* xi. 164.

*subtilitas* of the old *legis actiones*, and the uses to which they were put, which brought about their downfall,<sup>1</sup> and it was the doctrine of liberal interpretation which gave rise to the praetor's *utilis actio*. That it was immensely important in the general discretion of Roman Courts is shown by the abundance of references to it throughout the *Corpus Iuris*.<sup>2</sup>

6. It follows from the above principles that the responsibility of the Judge is high and his function wide. Maitland has compared the Judge in a primitive system of law to an umpire whose function it is to give 'Out' or 'Not out' to the 'How's that?' of the players in the game of pleading.<sup>3</sup> Such, doubtless, was the whole duty of the umpire—the *praetor*—in the *subtilitas* of the archaic Roman Law; but in the maturity of classical jurisprudence, a new kind of umpire—the *iudex*—plays a much more individual rôle with a greatly extended discretion. Instead of merely regulating the game, he has the important duty of assessing damages: he has his ductile *exceptio doli*; in personal actions, he has a wide field of *bona fides*; in real actions, he has his adaptable *formula petitoria*.<sup>4</sup> And throughout, he is expected to behave not like a machine, but like a *vir bonus*.<sup>5</sup>

Criticisms  
of equity  
in Roman  
Law.

It is not to be supposed that these principles of equity in Roman Law always passed unchallenged.

<sup>1</sup> Gai. *Inst.* iv. 30.

<sup>2</sup> The terms in which it is described vary considerably: thus *benignus*, D. 8. 3. 11, D. 12. 1. 20, D. 39. 5. 25; *humanus*, D. 28. 5. 29, D. 29. 2. 86; *humanitatis ratio*, D. 4. 6. 38. 1, D. 49. 5. 12. 5; *ex bono et aequo*, D. 11. 7. 14. 6, D. 39. 2. 19 pr.; *aequitas et officium viri boni*, D. 46. 6. 12; *quam rationem bonus paterfamilias reciperet*, D. 40. 4. 22. No exact definition can be given of the cases in which the principle may arise: 'multi casus . . . nec singulatim enumerari potuerunt,' D. 4. 6. 26. 9 (of *in integrum restitutio*). The references are very numerous, but the following are also characteristic: D. 11. 7. 43, D. 41. 1. 7. 5, D. 41. 3. 32. 2, C. 8. 16. 5, C. 3. 42. 8.

<sup>3</sup> P. & M. ii. 671.

<sup>4</sup> Cuiq, *op. cit.* 46.

<sup>5</sup> D. 45. 1. 137. 2; cf. D. 4. 6. 26. 9, C. 5. 13. 7, C. 7. 71. 3.

We may be sure that disingenuous appeals to *naturalis aequitas* were no more uncommon in the Roman than in the Greek Courts; and sometimes we hear vigorous protests against taking liberties with the express provisions of the law. For example, one of Quintilian's speeches<sup>1</sup> throws an interesting light on the methods which were sometimes adopted to evade the very clear provision of the Lex Voconia that a wife could not take more than half her husband's property on his death by way of legacy. It was an old statute, probably passed about the middle of the second century B. C., and though unrepealed, it had evidently been attacked as obsolete and inelegant. 'Nowadays', says the orator, 'there is a tribe of ingenious pleaders who would have us "interpret" this statute. It does not, they claim, mean what it says. I greatly admire these gentlemen's shrewdness: they are much more acute than our ancestors—those mere founders of the law, mere framers of our legal system: they must be more acute, or they would not attempt to show that these ancestors of ours lacked both speech and sense. Now before I deal with the purpose of this particular statute, I have just this one remark to make to the Court, that this kind of so-called "interpretation" is thoroughly mischievous. For if the Court is always to be spending its time turning statutes inside out to find out what is just, and what is equitable and what is expedient: well, then, there might as well be no statutes at all. No doubt there was a time when law was nothing but a kind of native justice. But because justice appealed to different minds in different ways, and it was therefore impossible to decide with certainty what it ought to be, a definite form of law was established to govern our lives. That form the framers of statutes expressed in explicit words: and if everybody is to be allowed to change it and twist it to his own purposes, the whole force and purpose of the law is gone. We might just as well have no laws at all as uncertain laws.'

Such protests, expressed with as much common sense as vigour, were no doubt sometimes necessary as a counterblast. But in reality there was no funda-

<sup>1</sup> *Decl.* cclxiv.

mental antinomy between safe, certain law, and a humane interpretation of it; and it cannot be doubted that in the Roman system the two principles were equally settled and equally salutary.

### III. EQUITY IN ENGLISH LAW

1. *Relation between Common Law and Equity.* In the English system, 'equity' has acquired a technical connotation and we are accustomed to think of it as a whole jurisdiction distinct from Common Law principles. But the general conception of equity as a moderating and humane influence was inherent in our jurisprudence long before it became specialized first by the King's Council and then by the Chancellor himself apart from the Council. The Anglo-Saxon and early Norman and English kings were 'fountains of justice' in the very real sense that they themselves dispensed justice. Their jurisdiction was not confined to the ordinary course of litigation, but a prerogative of *mercy* and *equity* was an essential part of their regal office.<sup>1</sup> In this respect they embodied a principle which is invariably associated with the early conception of kingship, and which, whether or not it be actually derived from Roman doctrines,<sup>2</sup> is clearly formulated in the principal pattern of European sovereignty, that of Byzantium.<sup>3</sup> It is characteristic that in the so-called Laws of Henry I the king is described as the defender of the poor and defenceless,<sup>4</sup> and it is in the same spirit that in all our records of the Council and the Chancery, so far as they have been investigated, the 'common form' of petition is the appeal *ad misericordiam*.

*Equity of royal Courts.* In the course of time the royal jurisdiction has been converted from a fact to a constitutional fiction; and the process which brought this result about—the *imperium in imperio* of the royal Courts of justice—began very early in our legal history and has been many times

<sup>1</sup> Spence, *Equitable Jurisdiction*, i. 77 ff.; Kerly, *History of Equity*, 13 ff.

<sup>2</sup> Allen on *The Prerogative*, 94.

<sup>3</sup> C. I. 14. 1, 9.

<sup>4</sup> Spence, *op. cit.* 78.

described. In the gradual erection of the great edifice of the Common Law, natural equity is not the least important of the foundation-stones. To Bracton,<sup>1</sup> following Roman precepts, equity is 'rerum convenientia quae in paribus causis paria desiderat iura et omnia bene coaequiparat'. It is *equality*: and the virtue of a Court of justice is to be *equal*, while the virtue of a *man* of justice is to be just. This borrowed<sup>2</sup> distinction is somewhat academic, but it sufficiently expresses the notion that a spirit of equity is inherent in any Court of justice worthy the name. Such undoubtedly was the accepted principle during the critical period of the thirteenth century. It is well summarized by Maitland, writing of the age of Henry III: <sup>3</sup>

'We must . . . remember, first, that a contrast between *aequitas* and *rigor iuris* is already a part of what passes as philosophical jurisprudence, and secondly, that our King's court is according to very ancient tradition a court than can do whatever equity may require. Long ago this principle was asserted by the court of Frankish Kings and, at all events since the Conquest, it has been bearing fruit in England. It means that the royal tribunal is not so strictly bound by rules that it cannot defeat the devices of those who would use legal forms for the purposes of chicane; it means also that the justices are in some degree free to consider all the circumstances of those cases that come before them and to adapt the means to the end. In the days of Henry II and Henry III the King's court wields discretionary powers such as are not at the command of lower courts, and the use of these powers is an exhibition of "equity". Often on the plea rolls we find it written that some order is made "by the counsel of the court" (*de consilio curiae*). It is an order that could not be asked for as a matter of strict right; the *rigor iuris* does not dictate it—would perhaps refuse it; but it is made in order that the substantial purposes of the law may be accomplished without "circuitry of action". The need of a separate court of equity is not yet felt, for the King's court, which is not

<sup>1</sup> F. 3 (Woodbine, ii. 25).

<sup>2</sup> From Azo; Maitland, *Bracton and Azo*, S. S., vol. viii. 27.

<sup>3</sup> P. & M. i. 189 f.

as yet hampered by many statutes or by accurately formulated "case law", can administer equity.'

Equity  
through  
Common  
Law  
forms.

This does not mean that in the English Courts of the thirteenth century justice was no more than 'justice as between man and man'. Procedure and technical rules were strict, and could not be ignored with impunity; but the Courts were endeavouring to find the compromise—always difficult—between substantial justice and a proper discipline of form.<sup>1</sup> Further, although the Common Law jurisdiction grew up on a framework of writs, even within that inflexible system there were not a few important remedies which later would have been considered typically 'equitable', in as much as they aimed rather at the 'specific relief' characteristic of the Chancery than the damages characteristic of the Common Law.<sup>2</sup> Thus we find the enforcement of what were virtually uses or trusts of chattels or money by writs of detinue and account; <sup>3</sup> at least until the time of Edward I, the enforcement of gages of property, with relief to the gager very much in the nature of an equity of redemption; the specific enforcement of contractual obligations, aimed unmistakably *in personam* and not, as we expect of the Common Law, *in rem*; writs of prohibition and estrepement which are for all practical purposes injunctions, prohibitory and mandatory, interlocutory and perpetual; and writs called by Coke '*brevia anticipantia*, writs of prevention', of some half-dozen kinds,<sup>4</sup> which are strongly analogous to the later bills of *quia timet* in Chancery.

A striking example of the kind of equitable relief which is given as early as the beginning of the four-

<sup>1</sup> Holdsworth, *H. E. L.* ii. 250 ff.

<sup>2</sup> Hazeltine, 'The Early History of English Equity' in *Essays in Legal History*, 1913 (ed. Vinogradoff).

<sup>3</sup> Hazeltine, *op. cit.*, following Ames, 'History of Parol Contracts Prior to Assumpsit', *Select Essays in Anglo-American Legal History*, iii. 340 ff.

<sup>4</sup> *Mesne, warrantia cariat, monstraverunt, audita querela, curia claudenda, ne iniuste vexes*: Co. Litt. 100 a; Hazeltine, *op. cit.*

teenth century is a case to which Maitland has called attention.<sup>1</sup>

'A man has bound himself to pay a certain sum if he does not hand over a certain document on a certain day. Being sued upon his bond, he is unable to deny that he did not tender the document on the day fixed for the transfer; but he tenders it now, excuses himself by saying that he was beyond the sea, having left the document with his wife for delivery, and urges that the plaintiff has suffered no damage. The plaintiff relies upon the words of the bond, and we must confess to having thought that in and about the year 1309 judgement for the plaintiff would have followed as a matter of course. But to our surprise Bereford C.J., after remarking that what is sought to be recovered is not properly speaking a debt (*purement dette*) but a penalty (*une peine*), exclaims, "What equity would it be to award you the debt when the document is tendered and you cannot show that you have been damaged by the detention?" In the end the plaintiff is told that he will have to wait seven years for his judgement. Here certainly we seem to see "relief against penalties" and relief that is granted in the name of "equity", though it takes the clumsy form of an indefinite postponement of that judgement which is dictated by the rigour of the law.'

This, and a case of the same year, *Prior of Coventry v. Grauntpie*,<sup>2</sup> a clear example of a 'perpetual injunction', Maitland characterizes as 'premonitions of Equity', and observes: 'In divers quarters much evidence seems to be collecting which tends to show that the number of thoroughly new ideas introduced by the Chancellors of the later middle ages was by no means large.'<sup>3</sup>

These words, printed in 1904, proved prophetic, for the later researches of Mr. Bolland into the procedure in Eyre, of about the same date as the cases last mentioned, showed conclusively that equity, wide though it was at Westminster, was even wider before the itinerant justices.<sup>4</sup> The bills in Eyre of the early fourteenth

Equity in  
the Eyre.

<sup>1</sup> *Umfraville v. Lonstede*, Y. B. 2 & 3 Ed. II (S. S. ii), 58 and Intro. xiii.

<sup>2</sup> *Ibid.* 71.

<sup>3</sup> *Ibid.* xiv.

<sup>4</sup> Bolland, *Eyre of Kent* (S. S., vols. xxiv, xxvii, xxix); *Select Bills in Eyre* (S. S., vol. xxx).



century are indeed a remarkable example of the king's vicarious justice.<sup>1</sup> We cannot better describe their general characteristics than in Mr. Bolland's own words: <sup>2</sup>

'So far as we have gone we find that these bills are addressed to the Justices of the King "who are put in the place of the King to do justice". They are largely used by very poor people. No rules as to form affect them, so that, no expert knowledge being necessary, they can be framed and presented by anyone who can write or can get another to write for him. There is no evidence that any fee was payable on presentation of a bill, as it was on the purchasing of a writ, but there is conclusive evidence that the way of a very poor man to the ear of the King's Justices was made easy for him. Now to what does all this point? Surely to the immemorial belief that inherent in the King are the right and the power to remedy all wrongs independently of common law or statute law and even in the teeth of these; the right and the power, in fact, to do as he likes, whatever hard law and still harder practice may dictate; and the hope and the trust that, his own personal interests being in no way concerned, he will right the wrong and see that justice is done. And the Justices in Eyre were in a very special sense impersonations of the King who had received from the

<sup>1</sup> That the Judges specifically claimed a wider jurisdiction in Eyre than in Bank seems to be sufficiently shown by an emphatic remark of Spigurnel J. in *Bruce v. Horton*, Y. B. 6 & 7 Ed. II (Eyre of Kent), S. S., vol. xxix. 198:

Maud that was wife of William Bruce brought the *scire facias* against John of Horton calling upon him to show whether he had aught to say why execution should not be done of the judgement given between this same Maud and John of Horton, father of the aforesaid John, &c., before the Justices in Bank; and note that John of Horton said that he ought not to answer unless he had notice by a writ from the King as was the rule before the Justices in Bank.

*Westcote*. That is not so. If a man be within the jurisdiction it is sufficient if he have notice by precept. You are within the jurisdiction, and therefore you have had sufficient notice.

*Malmerthorpe*. You ought not to be in a better position than the Justices in Bank.

*Spigurnel J.* You are talking idly. We can do many things which they cannot do. And so answer.

<sup>2</sup> S. S., vol. xxvii, p. xxviii.

King not only authority to hold all pleas, but, further than that, authority to hearken to and to give amends for any complaint that should be brought by any against any other.'<sup>1</sup>

Among many examples of this kind of jurisdiction in the Eyre of Kent we may take a case in which the justices, through pure considerations of hardship (*duresse*), abate a writ of debt, perfectly good in law, against an executor:<sup>2</sup> and the pitiful story of John Fesrekyn, a poor man who had deposited a sum of six marks as perpetual security for board and lodging. The landlord not only failed to give value in bed and board, but with a pleasing reversion to *manus iniectio*, imprisoned his guest and loaded him with a chain, 'and gave me a scrap of bread as though I had been but a pauper begging his bread for God's sake, and through him I all but died of hunger'. John protests that, owing to the conspiracy of the rich to oppress the poor, he cannot afford counsel's fee, and begs that he may have his money back before the Judge leaves the town: in return for which favour he will go to the Holy Land and pray for the Judge, 'by your name, Sir John de Berewick'. Apparently John got his money, 'and', adds Mr. Bolland with a piety which every reader of this moving tale must share, 'if he afterwards reached the Holy Land I hope he did not forget his promise to Sir John Berewick'.<sup>3</sup>

Whether these doctrines of the Eyre were, as Mr. Bolland suggests,<sup>4</sup> 'the very beginning of the equitable jurisdiction'—meaning the jurisdiction of Chancery—is open to question;<sup>5</sup> but there can be no doubt that they represented a frame of mind which was deeply characteristic of justice as conceived by the ordinary Courts of the king.

<sup>1</sup> Cf. S. S., vol. xxx, p. xv f.

<sup>2</sup> *Anon. v. Anon.* (S. S., vol. xxvii. 42). Cf. Y. B. 6 Ed. II (S. S. xiii. 226 f.), cited Holdsworth, *H. E. L.* ii. 335.

<sup>3</sup> S. S., vol. xxvii, p. xxiii f. Cf. Pollock, 'The Transformation of Equity', *Essays in Legal History*, 1913 (ed. Vinogradoff), 292.

<sup>4</sup> S. S., vol. xxvii, p. xxix.

<sup>5</sup> Holdsworth, *H. E. L.* ii. 342 ff.

Con-  
tinuous  
relation  
between  
Common  
Law and  
Equity.

Yet they did not remain, at all events in full, with the ordinary Courts of the king, but were destined to pass to the special cognizance of the Chancellor. The *rigor iuris*, in the form of a very elaborate writ-procedure, triumphed over the *humana interpretatio*, and the principles of equity passed to other hands. It is no part of our present purpose to describe how English equity became divided from the Common Law, and through what historical causes, being once separated, it developed. That curious tale has been sufficiently told by legal historians, though important parts of it are still obscure.<sup>1</sup> For better or for worse, the stream of English law divided into two channels, not without considerable disturbance of the soil and some turbidity of the waters. But the interdependence of law and equity has never wholly disappeared; the waters in both channels have come from the same stream. 'We ought', as Maitland said,<sup>2</sup> 'to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code. . . . We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law.' It is true that once the divergence had taken place, it was impossible to ignore it. Attempts at a complete *rapprochement*, especially the well-known attempt of Lord Mansfield, failed, though not ignobly. But to this day there are many doctrines in the Common Law which are essentially equitable in character, if we use the word 'equitable' in its wider sense. As Lord Mansfield rightly saw,<sup>3</sup> the whole basis of quasi-contract is equitable, being founded on natural justice and 'imposed by law as the result of a desire to do justice between parties who have been brought into

<sup>1</sup> Holdsworth, *H. E. L.* ii. 341, 524, 554, 591 ff., &c.; Spence, *op. cit.* i. 322 ff., &c.; Baldwin, *The King's Council*, 246 ff.

<sup>2</sup> *Equity*, 18 f.

<sup>3</sup> *Moses v. Macfarlane* (1760), 2 Burr. 1009.

relation with one another, where such relation is not strictly one of contract'.<sup>1</sup> An equitable spirit is also conspicuous in the Common Law treatment of voidable contracts, of subrogation,<sup>2</sup> of contribution between co-sureties and between debtor and surety, and of bailment.<sup>3</sup> Nor is it to be imagined that 'natural justice', however much it may be distrusted as against a positive rule of law, is by any means a mere simulacrum in our Courts of Common Law.<sup>4</sup>

If we look for one general principle which more than any other influenced the equity developed by the Chancery, we find it in a philosophical and theological conception of *conscience*. The term was from an early date familiar to English lawyers. In the Common Law Courts of the thirteenth and fourteenth centuries, we hear a good deal, in many connexions, about 'conscience', 'good faith', 'reason', 'conscience and law', 'the law of conscience', 'law and right', 'law, right, and good conscience', 'right and reason', 'reason and good faith': of 'equity' we hear very little.<sup>5</sup> In the practice of the Chancery, when it bifurcated from the Common Law, we hear still more about *conscience* from

2. *Equity and morality in English law.*

Conscience.

<sup>1</sup> Sir John Miles, *Digest of English Civil Law* (ed. Jenks), Bk. II, Pt. III, Art. 707. But on a 'well-meaning sloppiness of thought' in introducing unnecessary equitable elements into the action of money had and received, see Scrutton L.J. in *Holt v. Markham*, [1923] 1 K.B. 504, 513 ff., and Mr. H. G. Hanbury on 'The Recovery of Money', *L. Q. R.* xl. 31.

<sup>2</sup> See Buckland, *Equity in Roman Law*, 47 ff.

<sup>3</sup> S. G. Fisher, 'Equity through Common Law Forms', *L. Q. R.* i. 462; and see on *brevia anticipantia*, *ante*, p. 214. Even a constitutional remedy like the Petition of Right is said to be founded on 'moral equity and conscience': Tindal C.J. in *Gibson v. East India Co.* (1839), 5 Bing. N.C. at p. 274 (*scil.* before the passing of the Petition of Right Act, 1860).

<sup>4</sup> 'Principles of private justice, moral fitness, and public convenience . . . when applied to a new subject, make common law without a precedent': per Willes J., *Millar v. Taylor* (1769), 4 Burr. 2303, 2312. See *ante*, p. 167, and *Sinclair v. Brougham*, [1914] A.C. 398, especially the speeches of Lords Dunedin and Sumner.

<sup>5</sup> Baildon, *Select Cases in Chancery* (S. S., vol. x), xxix f.

an angle of view which attempts, though with only partial success, to be scientifically dialectical.

St. German. For this is the ambitious aim of the remarkable treatise of St. German, 'Doctor and Student', which appeared early in the sixteenth century. It attempts to approach our whole system of law from the standpoint of moral philosophy. A Doctor of Divinity, professing ignorance of technical rules of law, seeks enlightenment from a student of law as to the attitude of our jurisprudence towards conscience. The ensuing discussion is not always very clear; it wanders into many by-paths, interesting enough in themselves, but bearing a somewhat tenuous relation to the main inquiry. It is only by nimble acrobatics that the writer brings all his various topics back to his central theme, and for this reason the treatise as a whole leaves the impression of being amorphous. But the attempt is highly instructive, if over-ingenious.

What does St. German mean by conscience? Naturally the reply lies in the mouth of the Doctor of Divinity. He treats us to an academic account of *sinderesis*,<sup>1</sup> reason, and conscience, all plainly canonical and somewhat pietistic in conception. Then he proceeds to the elements of equity. It is a righteousness that considers all the particular circumstances of the deed, tempering justice with mercy. This is a necessary element in every law, 'for the extreme righteousness is extreme wrong: as who saith, if thou take all that the words of the law give thee, thou shalt sometimes do against the law'. It is not possible to frame any general rule of law which will not fail in some cases; and it is an implied reservation in every law that it is not to operate against the law of God and the law of reason. Any law without this limitation is doomed to failure: 'for such causes might come, that he that would observe the law should break both the

<sup>1</sup> A crude Anglicization of *συντήρησις*: Vinogradoff, 'Reason and Conscience in Sixteenth-Century Jurisprudence', *L. Q. R.* xxiv. 374.

law of God and the law of reason.' Thus equity follows the intent rather than the words. The Student supports this view by legal examples, citing as an instance, among others, a statute of Edward III which forbids, on pain of imprisonment, the giving of alms to any valiant beggar. If, he says, a man were to meet a beggar actually perishing for want of succour, and give him assistance, he would be excused from the statute by the law of reason. Yes, says the Doctor, but would he be excused at Common Law, or, for the matter of that, in the Chancery? The Student is very doubtful; but thinks he would be excused on the ground that the statute must have intended such an exception. Some discussion follows on various rules of the Chancery, and the Student makes the important point that the Chancery acts *in personam* by means of the subpoena, and this is its characteristic mark. We learn from a reply to one of the Doctor's questions that the technical jurisdiction of the Chancery was not even yet known by the general term 'equity', that word being understood in its broad meaning of natural justice.

St. German's preoccupation is with *equity in general*, Canon Law. the faculty, sublimated in conscience, of discerning between good and evil and inclining towards the good; it 'is not occasional and overriding interference, but enlightened scientific interpretation'.<sup>1</sup> Sir Paul Vinogradoff has shown<sup>2</sup> that St. German derived many of his ideas and practically all his method from John Gerson (1363-1429), the famous 'Doctor Christianissimus' and 'Doctor Consolatorius' and Chancellor of the University of Paris. In effect, therefore, *Doctor and Student*, which came at a most opportune time in the development of the Chancery and was very widely known,<sup>3</sup> expounded canonical doctrines for the benefit of English readers and particularly of English lawyers.

<sup>1</sup> Pollock, 'The Transformation of Equity' (*loc. cit.*), 294; cf. Holdsworth, *H. E. L.* v. 268.

<sup>2</sup> *Op. cit.*

<sup>3</sup> Holdsworth, *H. E. L.* v. 266 ff.

Systema-  
tization of  
equity.

Not only did the book itself exercise a considerable influence, but it is symptomatic of a tendency big with important consequences for English equity: it meant that 'the common lawyers of the fifteenth century joined the ecclesiastics seated in the Chancery in framing views about the administration of equity, which, though Decretals and Summae Confessorum were not quoted, strongly savoured of the principles and distinctions of the Canon Law. The marked differences on particular points are hardly sufficient to obliterate the impression that we have to reckon not only with the stress of business requirements and with a spontaneous growth of English doctrines, but also with a process of indirect reception of Canon Law'.<sup>1</sup> Thus English equity begins to be systematized under the guidance of a governing moral principle. Not that we can suppose that all the Chancellors were assiduous and consistent in the pursuit of that principle. Under the Tudors some of them behaved with an arbitrariness worthy of their royal masters, going far beyond the proper function of a Court of Conscience in imposing all kinds of extra-legal duties on litigants. These occasional aberrations may have inspired Selden's oft-quoted, but probably only half-serious quip about the length of the Chancellor's foot. But they were not typical; the 'conscience' which the Chancellor set before him was normally something more constant and imperishable than the mere caprice of his own whim. A 'hardening' process sets in. By 1676 we find Lord Nottingham expressly repudiating the notion that the conscience of the Chancellor is merely *naturalis et interna*,<sup>2</sup> and in 1818 Lord Eldon summarily repudiates any notion of mere individual discretion being open to an Equity Judge.<sup>3</sup>

<sup>1</sup> Vinogradoff, *op. cit.*

<sup>2</sup> *Cook v. Fountain*, 3 Swanst., 385, 600.

<sup>3</sup> *Gee v. Pritchard*, 2 Swanst., 402, 414; see Spence, *op. cit.* i. 413 ff., and *post*, App. C, p. 375.

Let us remind ourselves briefly of the principal forms which this settled system of conscience has taken in English law. Each one of the doctrines of the Chancery has a history of its own, and many accidental elements have entered in during the course of development; but we may distinguish certain leading principles. Sir Thomas More summarized them aphoristically as 'fraud, accident, and things of confidence'.<sup>1</sup> That classification still covers no small part of the ground, but in modern equity may be expanded as follows:

3. *Forms of English equitable jurisdiction.*

1. *'Things of confidence.'* The enforcement of obligations dictated rather by conscience than by a positive *vinculum iuris*—sometimes, indeed, dictated in direct opposition to the law. Here we must place uses and trusts, still the most important part of Chancery jurisdiction. Here, too, the equity of redemption in mortgages, and equitable obligations between principal and surety, partners and co-adventurers (including general average contribution). In these cases equities are enforced in bilateral obligations: a unilateral obligation is imposed on the executor and administrator, with a peculiarly stringent fiduciary duty both to the quick and the dead. 'Confidence' is also the starting-point of technical doctrines such as conversion, joint ownership, assignment of choses in action and powers of appointment.

Things of confidence.

2. *Fraud.* Unconscionable dealing short of actionable deceit at Common Law. Here the Chancery had to proceed with caution. It would be going much too far to repudiate a legal bond merely because one of the parties to it had not acted up to the highest standards of honour or conscience. Equity did not pose as pure morality. It could not, for example, reject a defence based on a strict statutory rule merely because it was morally unmeritorious.<sup>2</sup> It could sometimes find a way

Fraud.

<sup>1</sup> 1 Roll. Abr. 374; Spence, *op. cit.* i. 413.

<sup>2</sup> None the less, equity has sometimes come very near to abrogating the provisions of statutes. It is only by a transparent fiction that the



round technical Common Law rules in the interests of conscience—e. g. it could refuse to make a debtor pay twice over solely because he had lost the written acquittance of his first payment. But for the most part equitable fraud came within the domain of 'things of confidence', resolving itself into cases—generically, undue influence and catching bargains—where there was some special relationship of trust or confidence between the parties.

Accident. 3. *Accident*, or, as it used to be called, 'extremity'. The doctrine cannot be precisely formulated, since of its very nature it contemplates the undefined case: the case where, through the happening of some unforeseen event, or through the omission or misstatement of some term, an obligation good in its essence stands in danger of being thrown away. The cause of the defect must be purely accidental, in the sense that it could not have been foreseen by reasonable prudence. Equity is not a *procurator fatuorum* and no man has a claim to be relieved from his own weakness, unless he was from the first at a disadvantage or his disability was deliberately exploited. Out of this doctrine grow the equitable jurisdiction in regard to mistake, and as a corollary, the rectification and rescission of documents.

Giving  
effect to  
intentions. 4. *Giving effect to intentions*, more especially those in 'equitable doctrine of part performance' can be said to 'follow' s. 1 of the Statute of Frauds and s. 3 of the Real Property Act, 1845: in reality, it can and does render those sections nugatory for all practical purposes. On the propriety of a trustee in bankruptcy pressing a strictly statutory right, see *Scranton's Trustee v. Pearce*, [1922] 2 Ch. 87, and preceding cases there cited; *L. Q. R.* xxxviii. 402 and present writer's 'Legal Morality and the *Ius Abutendi*', *L. Q. R.* xl. 164. 'Where there is an apparent fraud, or a case dubious in the law of which the party could not have knowledge, this will be aided in equity encounter the statute': *Roll. Abr.* 378 (S.), 4, 6; an extremely vague doctrine, which is, however, apparently the basis of the equitable evasions of the Statute of Frauds: *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. The situation does not seem to be affected by the Law of Property Act, 1925, s. 52: see Cheshire, *Modern Law of Real Property*, 112 ff.

tentions which are dubiously or imperfectly expressed. This is, or ought to be, the guiding principle in the interpretation of wills, settlements, and other documents. In practice, artificial rules of construction have in a great measure overlaid the central notion of penetrating to the actual intention behind the words.

5. *Tutelary jurisdiction* in respect of those who, through special circumstances, are particularly in need of protection: infants, married women, mariners, borrowers, those subject to harsh penalties, and formerly the poor and the insane. The principle here is humanity amounting, at its highest, to actual tutelage in the case of infants; at its lowest, to a very present help in time of trouble. In the same spirit, Chancery exercises a special benevolence towards public charitable objects. There is no more characteristic instance of this spirit of enlightened benignity than the example set to the legislature in the protection of married women's property from 'kicks and kisses'.<sup>1</sup>

Tutelary jurisdiction.

6. *Remedies supplementary to the Common Law*: specific performances, specific restitution, and formerly discovery of documents; injunctions mandatory and prohibitory.

Supplementary remedies.

Throughout these several departments of jurisdiction runs the common principle that the Chancellor addresses himself directly to the conscience of the individual—acts *in personam* by means of the subpoena and is therefore independent of territorial limits of jurisdiction.

#### IV. EQUITY AS A SOURCE OF LAW

These principles and their many subsidiary departments have, for a century at least, been established in our law as a rigid system, and from the beginning of our legal studies we are accustomed to think of law and equity as sharply divided. The distinction has certainly

Common Law and equity not necessarily distinct branches of jurisdiction.

<sup>1</sup> Dicey, *Law and Opinion in England*, Lect. XI.

been modified by the Judicature Acts, but the policy of those statutes, so often referred to as a 'fusion', in no sense meant the merger of one system in the other. There is still a gulf between the Common Law and the Chancery. The training is different, the habit of thought is different, the subjects of jurisdiction are different; and the English Bar is still divided into two kinds of practitioners who deal with quite distinct kinds of material and may be said without impiety to stand to each other in a state of friendly neutrality. Nobody supposes nowadays that equity is purely matter of conscience and Common Law purely matter of *ius strictum*. They are simply different branches of legal science; but the boundary between them is so clearly drawn that we in England are apt to think of the duality as juristically inevitable. It is not so to-day in Continental systems. In France and Germany, for example, equity is a clearly recognized element in the administration of justice, and is enjoined upon the Judge, but is assigned to no special jurisdiction.<sup>1</sup> Austin rightly insists that the cleavage which occurred in the Roman and English

<sup>1</sup> *Code Civ.*, Art. 565: 'Le droit d'accession, quand il a pour objet deux choses mobilières appartenant à deux maîtres différents, est entièrement subordonné aux principes de l'équité naturelle.' Art. 1135: 'Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation, d'après sa nature.' Art. 1854: 'Si les associés sont convenus de s'en rapporter à l'un d'eux ou à un tiers pour le règlement des parts, ce règlement ne peut être attaqué s'il n'est évidemment contraire à l'équité.' See further Gény, *Méthode d'Interprétation*, ii. 109, 112. The provisions of the *Bürgerliches Gesetzbuch* as to good faith are wide and far-reaching; e. g. Art. 133: 'Where a declaration of intention has to be interpreted, the real meaning of the act of volition must be inquired into, without attaching undue importance to the literal meaning of the expression of intention.' Art. 157: 'Agreements must be interpreted in accordance with the requirements of good faith, having regard to business usage.' Art. 242: 'The debtor is under an obligation to effect the promised performance in such manner as good faith between the parties requires, due regard being had to ordinary usage.' See further Schuster, *German Civil Law*, 104 ff., 144.

systems is to be attributed to historical causes and not to any necessity in the nature of the case. We have seen that the general spirit of equity was inherent in our medieval Courts, and that certain doctrines which we have come to think of as peculiarly equitable in the technical sense were anticipated by Common Law writs and by the practice of the itinerant justices. It has been contended by writers of authority that the separation which eventually took place was bound to happen in the natural order of things, and that it was fortunate for our jurisprudence that it did happen;<sup>1</sup> but while we must admit the practical inconveniences which might have arisen in respect of procedure, it is difficult to doubt that had things fallen out differently, and had the Chancellor's separate jurisdiction never been recognized, our Common Law would have found that a vigorous element of equity was indispensable to its existence.

We must not, then, regard a self-contained, separate system of technical equity as a necessarily characteristic source of law. But on the other hand we cannot regard equity, as some writers would have us do, as merely a frame of mind in dealing with legal questions, and not a source of law.<sup>2</sup> It is a frame of mind so essential as an adjunct of strict law that we cannot rule it out as a source of legal institutions. Many other 'frames of mind' are, in a sense, sources of law, simply because law is a product of human reason: morality, religion, logic, convenience, economic necessities, and many the like all exert a formative influence. But these are sources only indirectly, whereas legal notions and rules are perpetually derived directly from equity. Doubtless the ultimate source is the natural sense of justice inherent in conscience; but the lawyer is concerned to discover the concrete forms which this fountain-head

But equity  
a necessary  
source of  
law.

<sup>1</sup> Kerly, *op. cit.* 11 ff.; Fisher, 'Equity through Common Law Forms', *L. Q. R.* i. 462.

<sup>2</sup> J. C. Gray, *The Nature and Sources of the Law*, 308.

of formal justice takes in known systems of law. The main lines of English equity which I have endeavoured to sketch are not mere casual phenomena. An intelligible principle of justice runs through them all, and their analogies are to be found in all systems where liberal interpretation has been at work.<sup>1</sup> Law cannot be conceived apart from interpretation, and one of the most important interpretative factors is a trained sense of *discretionary* justice. This remains true whether this part of the judicial function is assigned to a separate jurisdiction, as it is in England, or is part of the common property of all Judges, as it is on the Continent.

The *rigor*  
*aequitatis*.

It must be a matter of regret to many Englishmen that our system of equity, springing from such liberal principles, should have developed on lines which often seem to be the opposite of natural justice. It is a fact only too observable that while the litigant in the King's Bench has some rudimentary notion of his rights and his prospects, the litigant in the Chancery Division frequently cannot see a step ahead on his dolorous way. This is partly the heritage of our feudal land law, with the most tortuous intricacies of which the Chancery has had to wrestle. A person of ordinary intelligence can understand a simple contract and will not be entirely baffled even by a complicated contract; but put in his hands a strict settlement of real property, and were he the greatest genius born, he could not understand two consecutive sentences of it without some initiation into the mysteries of the Chancery.

And not all the artificiality of equity comes from the land law. It is a curious paradox that in its anxiety to respect conscience, Chancery has gone to extremes which sometimes paralyse conscience. (There is an 'over-righteousness' of equity as unfortunate in its consequences as the 'over-righteousness' of law, a *rigor aequitatis* as austere as the *rigor iuris*.) Thus the

<sup>1</sup> As, e. g., in Roman technical doctrines of equity: *ante*, p. 206.

anxiety to interpret intention has led to the establishment of rules which, degenerating into shibboleths, have merely succeeded in defeating intention. In this respect the Chancery has been far more deeply in bondage to precedent than the Common Law. 'In hearing case after case cited', said James L.J.,<sup>1</sup> 'I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed.' 'The doctrine of precatory trusts', said Lopes L.J.,<sup>2</sup> 'is a creature of equity, by whose aid the intentions of testators in my judgement, have too frequently been defeated.' We may respectfully admire the subtle erudition of Lord Macnaghten's account of the history of the Rule in *Shelley's Case*,<sup>3</sup> but when all is said we seem to have been reading something reminiscent of the learning of medieval schoolmen. The fine-drawn distinctions between contingent remainders and executory interests may be an admirable exercise in ingenuity, but are worlds remote from any valuable reality. The fantastic results of the Rule against Perpetuities are thus described by a modern Lord of Appeal trained in the principles of equity:

'We have in this case, my Lords, an extreme but by no means uncommon illustration of the stringency—I might even describe it as the penal character—of this rule. At no time was there here any practical possibility that a perpetuity could eventuate as a result of the complete fulfilment of the terms of the gift in question; while, by the time any contest as to the validity of the gift arose, it had become, by reason of the death of the testator's father, inconceivable that any infraction of the rule could be involved in it . . .

'In its application to the present case, the rule has been really a snare, useless so far as its legitimate purpose is concerned, but operative . . . to produce an intestacy under which certainly one

<sup>1</sup> *Lambe v. Eames* (1871), L.R. 6 Ch. 597, 599.

<sup>2</sup> *Hill v. H*, [1897] 1 Q.B. 483, 488.

<sup>3</sup> *Van Grutten v. Foxwell*, [1897] A.C. 658.

person would greatly benefit whose interests it was the permissible and express purpose of the testator by his codicil to circumscribe and reduce.

'In my experience nearly all modern manifestations of the rule are of this character, and have this result. . . . So far as the Courts are concerned, the existence of the rule in these days is usually made manifest only in cases where nothing of the kind having been desired or suspected, and where by nothing short of a miracle could a perpetuity at any time have supervened, even that possibility has, by the time of the contest, ceased to be existent. All the same in these cases the rule is fatal even to gifts so innocuous, and I cannot doubt that such a result is both mischievous and unfortunate, in many directions—in this notably, that it brings a sound principle into entirely gratuitous discredit.'

At one period the 'conscience' of the trustee was so severely scrutinized that ordinary honest execution of a trust became a matter of considerable difficulty; and it was not till 1887 that doctrines of this kind were tempered with common sense, not to say mercy.<sup>2</sup> The doctrine of the satisfaction of debts by legacies has been pushed to an unreasonable extreme, and there it still remains. The doctrine of consolidation of mortgages has reached a degree of questionable utility which only statute can cure;<sup>3</sup> and until 1914<sup>4</sup> the doctrine of 'collateral advantages' in mortgages bid fair to go the same road. Recent legislation, by reforming our troublesome dual system of devolution may, in course of time, straighten out the intricacies of conversion and reconversion; but that, too, is an equitable principle which has caused more frustration of purpose than it has ever brought enlightenment to dubious intentions.

On the whole, it may well be doubted whether utility

<sup>1</sup> Lord Blanesburgh in *Ward v. Van der Loeff*, [1924] A.C. 653, 677. Cf. Lord Buckmaster, *Portman v. P.*, [1922] 2 A.C. 473, 506.

<sup>2</sup> *Learoyd v. Whiteley*, 12 App. Cas. 727.

<sup>3</sup> It is left practically untouched by the Law of Property Act, 1925, s. 93. On the undesirable elements of the doctrine, see observations of all the Lords in *Pledge v. White*, [1896] A.C. 187.

<sup>4</sup> *Kreglinger v. New Patagonia Meat Co.*, [1914] A.C. 25.

and true equity would not have been better served if the Courts of Common Law had retained their equitable jurisdiction and developed it as part of the ordinary administration of justice. (The history of the Court of Chancery is one of the least creditable in our legal records. Existing nominally for the facilitation of natural justice, it was for long corrupt, obscurantist, and reactionary, prolonging litigation for the most unworthy motives and obstinately resisting all efforts at reform.) At no period was the Common Law open to the same charges in the same degree. It is not a century since a cleansing process had to be undertaken for the sake of public health, which was suffering severely. Charles Dickens did not exaggerate the desolation which the cold hand of the old Court of Chancery could spread among those who came to it 'for the love of God and in the way of charity'. All that is gone, and we breathe again a healthy atmosphere; but even to-day it is not in a spirit of cynicism, but of exact truth, that a modern Chancery Judge is able to say, 'This Court is not a Court of conscience'.<sup>1</sup> On both sides of its jurisdiction, modern English law shows an unnecessarily timid scepticism of conscience and an excessive veneration for prescriptive formula. We have no cause whatever to consider our methods superior to those of other nations who have kept their equity as an integral part of the law of the land, and not as the close preserve of a specialized jurisdiction which has too often made a laudable end subservient to questionable means.

#### SUMMARY

Reviewing our conclusions as to equity as a source of law: until recent times, when the technical elaboration of law has reached an advanced stage of development, a sharp line between the formal administration of, and the ethical ideal of, justice has not been drawn.

<sup>1</sup> Buckley J., *In re Telescriptor Syndicate*, [1903] 2 Ch. 174, 195.



In the growth of legal systems, a conscious aspiration towards a constant of fairness in legal relationships has played a large part in shaping substantive rules. Equity has been a 'supplementary or residuary jurisdiction' to strict law. This has been necessary because legal rules are formulated generalizations and as such are necessarily incomplete. Absolute uniformity cannot be achieved in the operation of any law, however excellent in itself, and unless a margin is left for extraordinary cases it will be found that *summum ius* is *summa iniuria*, and the essential purpose of *ius* is thereby thwarted. This margin of discretionary interpretation may take the form either of *equity in general*—a general disposition towards a humane and liberal interpretation of law; or *particular equity*—a humane modification of the strict law in individual exceptional cases not covered by the general rule. The former, as a general judicial attitude of mind, is comparatively easy to maintain and is essential to every rational system of justice; the latter is more difficult, because while hard cases are in themselves a reflection, not to be ignored, upon the rule which causes them, it is not always possible or desirable to relax a sound rule out of compassion for an unfortunate individual. In this sense, what is popularly called 'injustice' is inevitable in certain cases. Popular ideas of justice and injustice are not always to be trusted, being too much influenced by the particular and too little aware of the general. Nevertheless, the popular or natural sense of justice cannot be altogether disregarded; it has a real meaning in law, since it represents an average element in the community with which it is the aim of law to harmonize; and most of the equitable or discretionary ingredients which are constantly found in legal systems are based upon this primary sense of justice inherent in the average member of the community.

The necessity for a supplementary and benevolent jurisdiction was insisted on by the Greek philosophers.

Plato stresses the point that legal generalizations, if unmodified by a liberal spirit, become 'like an obstinate and ignorant tyrant', and that equity is therefore indispensable to any intelligent administration of justice. Aristotle holds that justice and equity are 'neither absolutely the same nor generically different'—i.e. the difference between them is not one of kind, but of degree, and equity is the higher degree. Its function is that of a *corrective* of legal justice, and it must be so again because the 'universality' of law cannot be completely universal. But in exercising this corrective function, equity must as far as possible follow the spirit of the law which it seeks to modify, and do that which it is to be presumed the legislator himself would have done had he contemplated the exceptional case. Thus equity embodies a moral ideal, and ~~it is constant and immutable~~ while positive law is inevitably subject to many imperfections and inconsistencies. These principles of equity were not mere counsels of perfection in Greek law. It is probable that pleaders, for their own purposes, made disingenuous appeals to equity when more tangible resources failed them; but there is ample evidence that despite all rhetorical exaggerations and forensic artifices, the general principle of equity was an integral and valuable part of the Athenian administration of justice.

Roman jurisprudence was influenced in no small measure by Greek philosophical ideas; and it is probable that this influence is to be traced in the Roman conception of *aequitas* and *aequum et bonum*, which is very prominent in Roman Law. It was commended and enjoined by imperial authority as a general principle of judicial interpretation; and it is to be found not only as an abstraction of speculative jurisprudence, but in many practical doctrines of the Roman system. It is recognized by a number of different titles in many various contexts, but may be said to have been particularly active in the supersession of agnation by the

claims of natural kinship, in the development of a governing principle of good faith as against mere form in contractual obligations, in the endeavour to discover and carry out the true intentions of those performing acts-in-the-law, in the discouragement of all unjust enrichment at the expense of another, in the opposition to supersubtle interpretation of the letter of the law and to the unmeritorious or malicious use of strict legal right; and finally, in a general discretion of good faith and common sense inherent in the office of the magistrate. These principles were doubtless sometimes appealed to, as in Greek law, to bolster up a case otherwise weak; hence we hear protests against their indiscriminate use; but kept within proper limits, and maintained consistently with a firm application of the general law, their effect on Roman Law was strong and beneficent.

In English law, equity has become, in the course of time, a technical system distinct from the Common Law; but its origin is not to be found exclusively in the jurisdiction of the Chancellor. A prerogative of mercy and equity was from the earliest times deemed to be resident in the royal office. In the thirteenth century, the jurisdiction of the King's Court is that of 'a court that can do whatever equity may require'. Under Henry II and Henry III 'the King's Court wields discretionary powers such as are not at the command of lower courts, and the use of these powers is an exhibition of "equity"'. Much is done purely *de consilio curiae*. The rules of substantive law are strict, those of adjective law even stricter; but the Court retains a general humane discretion. Further, a number of Common Law writs are directed towards remedies which later would have been considered essentially 'equitable' in character. The discretionary powers of the King's Justices were even wider and more vigorous in their jurisdiction in Eyre, and the itinerant Judges were regarded as representing the kingly office in doing

not what strict law, but what right and justice demanded. It is probable that these Common Law methods 'on circuit' influenced importantly the equitable principles subsequently developed by the Chancellor.

For historical and procedural reasons, the general principle of equity in England was destined to pass from the control of the Common Law to that of the Chancellor's Court. But the vital connexion between the two jurisdictions has always been maintained, and they are not to be thought of as two rival systems. Many doctrines of the Common Law are still 'equitable' in their nature and intent, and 'natural justice' is by no means an unreal element of our law to-day, though it must be regarded with jealousy and applied with caution.

In the jurisdiction of the Chancellor, the governing moral principle was that of conscience: an idea of theological origin, patiently expounded and much popularized by St. German in the early sixteenth century. It meant the partial acceptance by English Courts of doctrines of the Canon Law; and it was viewed not as a charter for mere caprice, but as a foundation for enlightened scientific interpretation. The Chancellors were not invariably consistent or conscientious in basing their jurisdiction on a uniform principle of this kind; but on the whole they strove steadfastly to do so, and the result was a consolidation of well-recognized principles of equity which reached a stage of approximate completeness under Lord Eldon. The main departments of equity have settled themselves in fiduciary relationships, fraud less than actionable deceit at Common Law, accidental and unforeseen cases of hardship, tutelary jurisdiction of those under permanent or temporary disability, and remedies supplementary to the Common Law. These principles and their many reticulations are now a separate and almost entirely technical system of law, and it is no longer

possible to think of the distinction between Common Law and equity in England as identical with the distinction between *ius strictum* and *aequitas*. But it is not to be supposed that the bifurcation of a legal system into these two branches is a juristic necessity. It is perfectly possible, and is the existing fact in most systems other than the English, that the two principles may be comprised within one body of law and administered by the same Courts. But it does not follow that equity is not in itself a distinct source of law. An element of discretionary justice is and always has been essential to the efficient interpretation and application of law. Equity is therefore the source of a vital factor in law, none the less vital because it is supplementary.

It is doubtful whether the general spirit and utility of equity in English law have gained by being detached in a separate jurisdiction. English equity has developed a rigour and artificiality of its own which have often resulted in the denial rather than the furtherance of natural justice. The desire to respect conscience has sometimes led to such an austerity that the dictates of conscience have become impracticable. Moreover, equity has shown an excessive conservatism in following and maintaining artificial rules when they have reached dubious extremes. The nineteenth century has, however, done much to reform and rationalize these defects.

## VI

### LEGISLATION

#### I. PLACE OF LEGISLATION AMONG SOURCES OF LAW

**W**HEREAS precedent is inductive, enactment clearly imposes the necessity of deduction upon the Courts. It is general and comprehensive in form, precedent particular and limited. A decision, whatever implications may be read into it by subsequent comparison and interpretation, exists primarily for the settling of a particular dispute: a statute purports to lay down a universal rule. This rule it may create for the first time; or it may, in the case of declaratory statutes, weld existing and possibly conflicting rules into a compendious form. For the most part its operation is prospective, though it may thrust back into the past if it chooses. It possesses a power of self-criticism and self-revision which precedent can exercise only indirectly and in a very subordinate degree. Abrogation is a highly important attribute of statute as applied both to preceding statutes and to rules, or supposed rules, created by decisions. Precedent is constitutive: it is carried on by its own momentum, and cannot retrace its steps. Nothing which is a true precedent, in the sense that it correctly embodies an observed rule of the Common Law, can be reversed by subsequent decision. Precedent is discarded either because it is not applicable to the case in hand, or because it proceeds on a misunderstanding of the law: because it is *not law*, it never was the law, and therefore never was a precedent properly so called. As we have seen, this power of scrutinizing the principles which cases purport to contain does give superior Courts a certain degree of censorship over the operation of precedent—

*x. Legislation compared with other sources of law.*

Compared with precedent.

a censorship, however, exercised with great caution as against the claims of antiquity. But it gives them no control over the principles themselves. The abrogative work of the legislature is subject to no such reservations. It abrogates a principle not because it is 'not law', but exactly because it *is* law. It can put an end to that which has been as freely as it can call into being that which has never been. Hence much of the work of the legislature is purely *negative* in effect—itsself a grave objection to the view of law as being solely a positive command. We shall see how for centuries our law has been struggling with the necessity of keeping this negative work abreast of social requirements.

Compared  
with  
jurist-law.

Inasmuch as it consists of an abstract formulation of a general rule, legislation resembles the authoritative generalizations of jurist-law. It is needless to point out that it possesses a positive sanction quite different in degree from that of jurist-law. The one is, however, helped by the other to no small extent; and it has not been uncommon for principles formulated by learned writers, or by Judges *obiter*, to be adopted bodily in our codifying or declaratory statutes.

Compared  
with  
custom.

The difference between custom and legislation as sources of law is manifest. The one grows out of practice, the other out of theory. The existence of the one is essentially *de facto*, of the other essentially *de jure*. Legislation is therefore the characteristic mark of mature legal systems, the final stage in the development of law-making expedients.<sup>1</sup> In short, while custom expresses a relationship between man and man, legislation expresses a relationship between *man and State*. It cannot exist until the notion of a central State, whether or not it be 'sovereign' in the sense understood to-day, has crystallized. It may be objected that we have been taught for many years past that legisla-

<sup>1</sup> 'The capital fact in the mechanism of modern states is the energy of legislatures': Maine, *Early History of Institutions*, Lect. XIII, 398.

tion, in the form of codes, is one of the earliest sources of law. But this is legislation in a very different sense. It does not proceed from anything which modern theory has taught us to regard as 'sovereign', but generally from a source deemed to be either divinely inspired or itself divine. How far, in the process of its interpretation, it created, and how far it was created by, *de facto* customary law has already been considered.<sup>1</sup>

If the relation between the State and the individual is regarded as nothing more than the relation of superior to inferior, the sovereign will, as expressed in legislation, may be arbitrary, despotic, and irrational. It need possess no social or moral content: that is a consideration lying outside its validity as law. It is merely the exercise of power, and the end to which the power is directed is not relevant to its authority as a command. Such was the Hobbian view, and the danger which it threatened largely inspired Savigny's distrust of legislation. The conception of law being imposed by external will, instead of growing of its own strength, was repellent to his whole theory of legal evolution. He could not, however, get rid of legislation or even codification by merely dismissing it from consideration. He lost his fight against it, and it was destined to develop even more rapidly than he could have imagined. But to justify it at all, he had to consider it as one of the tributaries of the great stream of popular law; and the conclusion was irresistible that if it was opposed to the main tendencies of native law, to that extent it deserved no recognition. Whether or not this view was justified in doctrine, it was clearly perilous in practice, since it raised insoluble problems between constituted authority and subjective judgement. Some of Savigny's followers escaped the dilemma by the same kind of reasoning which they applied to the supposed relationship between judicial interpretation and popular law. Enacted law, it was

2. *Relation between legislation and public opinion.*

Legislation and 'popular consciousness'.

<sup>1</sup> *Ante*, chap. ii.



said, is the creature of the legislator's thought and will. But once the law is put in circulation, it begins to live a life of its own, a life quite independent of sovereign will, and essentially in harmony with popular consciousness. Something of the same kind is held in France by those who find it difficult to reconcile the strict authority of the Code with the effect of judicial interpretation upon it.<sup>1</sup> Here, however, the 'separate life' of the enacted law takes its rise not from 'popular consciousness' but from the creative activity of tribunals.

Social  
elements  
in legisla-  
tion.

In modern democratic communities, the formula 'superior and inferior', or 'sovereign and subject', expresses only one aspect, and that not the most important, of the relationship between State and individual. The notion of a social contract, so far as it expresses mutuality of rights and duties between governor and governed—so far, too, as it expresses a compromise of individual liberty for the common weal—has not been without its lesson for modern Europe; and in striving increasingly to realize this principle of mutuality, the nineteenth and the twentieth centuries have reverted to the idealistic political theories of the ancient world. The spirit which dominates modern doctrine is observable in the trend of legislation. It is not a process solely of command and obedience, but of the action and reaction between constitutionally authorized initiative and social forces. Which creates the other: where one begins and the other ends: it is often very difficult to say. It is, however, certain that the great mass of 'inferiors' or 'subjects' are not nowadays simply passive recipients of orders.

Initiative  
of the  
legislature.

This is not to say that democratic government means the automatic reproduction of the wishes of a majority in all circumstances or indeed in most. Legislators are representatives of the electors who invest them with authority, but nobody to-day cherishes the doctrine

<sup>1</sup> *Ante*, p. 118.

which has sometimes been heard in the past—that 'representation' means the mechanical carrying out of a 'mandate'. The mandate of any representative body, or any single member of it, can only be given in the most general terms and cannot exist at all without a very wide discretion and an equally wide initiative. It needs but a glance at any volume of statutes to realize that a very great deal of the work of the legislature cannot be related to 'popular consciousness' or 'the will of the people' in any intelligible sense of those terms. The plain fact is that there is *no* consciousness or will in the people about innumerable enactments which both in their subject-matter, and in their very language, would convey nothing to the enormous majority of the free and independent electors. It is not only in the technical minutiae of the law that the legislature does and must assume the initiative, being elected for the express purpose that it shall do so. The same is true of great matters of social and national policy. There have been long periods in English history when Parliament has been sluggish and unproductive, and has left it almost entirely to the Courts to work out the principles of law. At other times its activity has been catholic and unceasing, and it has affected every domain of private and public life. The difference will be sufficiently realized by a comparison of the output of the age of Edward I<sup>1</sup> or the Tudor period with that of the eighteenth century. But nowhere is it more conspicuous than in the comparison between the eighteenth to early nineteenth century and the period of reform which began in 1832.

This latter period has been the special study of Professor Dicey and it is needless to travel again over the ground which he so brilliantly explored in his *Law and Opinion in England*. The effect of legislative industry he epitomizes in the terse phrase, 'Laws foster or

Public  
opinion.

<sup>1</sup> Holdsworth, *H. E. L.* ii. 299 ff., and 'The Reform of the Land Law: An Historical Retrospect', *L. Q. R.* xlii. 158.

create law-making opinion'; and in connexion with one of his most fully expounded examples of reformative legislation—the status of women in England—he sums up: 'Law and opinion are here so intermixed that it is difficult to say whether opinion has done most to produce legislation or laws to create a state of legislative opinion.' Since these words were written the movement to which they refer has been carried farther than Professor Dicey can have imagined in 1905, and certainly infinitely farther than the framers of the Married Women's Property Acts could ever have conceived possible. Whether or not laws 'created a state of legislative opinion' in the 'eighties about the so-called 'emancipation' of women, there can be no doubt that opinion produced the most recent developments of this course of legislation. It was not, perhaps, a very representative opinion; it probably aroused, among the majority of the nation, more opposition than sympathy; yet it was sufficiently persistent, however grotesque its methods, to prevail in the end. Here, then, we have an example of the converse process to that which we have been considering. The 'popular consciousness' with which legislation must always stand in harmony—at least in societies with representative government—is the code of prevailing convictions which we call public opinion. To quote Professor Dicey again:

'There exists at any given time a body of beliefs, convictions, sentiments, accepted principles, or firmly-rooted prejudices, which, taken together, make up the public opinion of a particular era, or what we may call the reigning or predominant current of opinion, and, as regards at any rate the last three or four centuries, and especially the nineteenth century, the influence of this dominant current of opinion has, in England, if we look at the matter broadly, determined, directly or indirectly, the course of legislation.'

It is true that these prevailing opinions are usually traceable to the influence of individual dominant minds;

it is true that in any age the main stream of opinion is often rendered turbid by cross-currents; but the main stream grows and flows, though it may sometimes run underground and become difficult for contemporaries to trace. Contemporaries, indeed, are frequently mistaken about public opinion; the politician himself, who is most concerned to gauge it, is sometimes startlingly mistaken in his calculations; but if it does not always manifest itself in palpable forms, it is no less a propelling force because it is unseen. The historian, viewing it in a more just perspective, is often able to see its form and intent where the men of its own generation are able only to *feel* it driving them in a certain direction whose end they cannot discern. So urgent is its impulse, so all-pervading its influence, and so momentous its achievements that we are warned to see in Savigny's People-Spirit something more than a mystical figment. Lacking sustained harmony with this public sentiment, sovereign legislation is sovereign only in name, and will soon cease to be even that. Other legislators must be found to restore the harmony and silence any lingering echoes of discord.<sup>1</sup>

It will be apparent that these observations apply only to the normal type of modern State. It is easy enough to imagine, or to find examples in history, of societies in which there has either been no articulate public opinion, or in which such opinion as exists is terrorized into silence by superior force. With the legislation of absolutist systems of government we are not now concerned, though it may well be questioned whether any government, however despotic, has ever been able to dispense entirely with the vital support of public recognition. We are to consider statute as a source of law in existing conditions. But we cannot understand its operation in a modern society such as England with-

<sup>1</sup> The conception of the *Zeitgeist* or *Zeitbestimmung* in law has been elaborated by Ihering, *Geist des römischen Rechts*, i, Introd., and especially 58 ff.

out first glancing at (1) the form of statute-law and (2) the manner in which statute has established its authority.

## II. FORMS OF LEGISLATION

Forms of  
ancient  
enact-  
ments.

We are accustomed to think of statute, according to the classic definition of Coke,<sup>1</sup> as that which has received the 'threefold assent' of King, Lords, and Commons. Anything less than this, whatever its persuasive force, has not the absolute authority of enactment; and we have had examples in modern times of the Courts refusing to recognize deliberative 'measures' of Parliament less than statutes—e. g. resolutions of the House of Commons.<sup>2</sup> But the 'threefold assent' cannot refer to a time earlier than that of Parliamentary government based on a definite constitutional theory of the Three Estates. If we go back to the twelfth century we cannot, of course, expect any such clear-cut conception of statutory forms and authority. So-called ancient statutes resemble modern statutes in that they are documents of public authority and governmental importance, but they are not invariably 'Acts' of King or Council, or of both together. They go by a bewildering variety of names—*carta*, *assisa*, *constitutio*, *provisio*, *ordinatio*, *statutum*, *isetnysse*: 'statute' is a rather less frequent term than most of the others, and seems rather to have meant 'something decided on', a *provision* of a public document rather than the whole document itself.<sup>3</sup> Often they are declaratory and imperative in form,<sup>4</sup> but almost as often are in the nature of grant, or confirmation,<sup>5</sup> than of command, and not

<sup>1</sup> 4 Inst. 25; cf. 2 Inst. 157.

<sup>2</sup> *Stockdale v. Hansard* (1839), 9 A. & E. 1; *Bowles v. Bank of England*, [1913] 1 Ch. 57.

<sup>3</sup> Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, II.

<sup>4</sup> e. g. Constitutions of Clarendon, 1164, Stubbs, *Sel. Ch.* (9th ed.), 161 ff.

<sup>5</sup> e. g. Statute of Merton, 1235, *Stat. R.*, i. 1.

infrequently of solemn agreement among magnates of the realm.<sup>1</sup> Controversy has been active as to whether the different names given to legislation represented any substantial distinction in nature and effect. Coke, for example, was positive enough about the distinction between a 'statute' and an 'ordinance', and his view has been upheld by some modern constitutionalists; but the most recent view is that if any such distinction existed, it was shadowy, not consistently maintained, and not of great practical importance.<sup>2</sup> The key to the position is that in the government of medieval England there is no conscious doctrine of separation of powers. What we should now call the legislative and administrative functions frequently overlap. Law comes from the king himself as the sole proper source of sovereign control, but it comes in the shape not only of general decree, but of particular instructions given to Judges and other public officers. This is particularly noticeable in the far-reaching formative work of Henry II.<sup>3</sup> In the thirteenth century the king is still theoretically the fountain of all law, but by the time of Henry III we may observe at least the beginnings of an understanding that he should not legislate for the whole realm without the advice and concurrence of his magnates.<sup>4</sup> Even in the fourteenth century, when the constitutional form of Parliament has become settled in essentials, there is no invariable line of demarcation between the legislative, judicial, and administrative functions.<sup>5</sup> From the time (1285) of the Statute of Westminster II we begin to recognize something like a 'common form' of enactment, but subordinate rules, amounting in effect to legislation, continue to exist.

<sup>1</sup> e. g. Provisions of Oxford (1258), Stubbs, *Sel. Ch.* 369 ff.

<sup>2</sup> Co. Litt. 159 b; 4 Inst. 25; McIlwaine, *High Court of Parliament*, 313, and *Magna Carta*, 145; Plucknett, *op. cit.* 32; Introd. to *Stat. R.*, ch. iii, s. 1.

<sup>3</sup> P. & M. i. 136.

<sup>4</sup> *Ibid.* 181.

<sup>5</sup> Plucknett, *op. cit.* 20.

'It is not', says Professor Holdsworth, 'till nearly the close of the Middle Ages that we can clearly distinguish between statutes and legislative acts less solemn than statutes.'<sup>1</sup>

Their un-  
certainty.

It follows inevitably from this indistinctness of legislative theory that our early records of statute law are highly imperfect. In 1800, when a Select Committee of the House of Commons reported on public records, it was stated 'that many statutes and ordinances in the rolls of Parliament are not inserted in the printed statute-book; and it is certain that many Acts and matters not found on any statute roll, nor contained in any printed edition of the statutes, are found on the Parliament Rolls, which appeared to have received the threefold assent of King, Lords and Commons, or to have such qualities as have been allowed by courts of law to imply that assent'.<sup>2</sup> Our first statute roll dates from 1278, our first Parliament roll from 1290. The statute rolls came to an end in 1468, or possibly 1489,<sup>3</sup> and their place was taken by Enrolments of Acts of Parliament, and by engrossed copies of the original Acts, which have been continued until the present time. It is only since 1887 that a volume containing the annual statutes has been printed each year by authority.<sup>4</sup> But printed collections of statutes, entirely unofficial in character, began to appear from 1481 onwards, the first being the *Vieux Abridgement des Statutes*, printed by Letton and Machlinia.<sup>5</sup> No official edition existed, with the result that we may see again the influence of jurist-law even in the domain of omnipotent sovereign legislation; for, as Professor Holdsworth observes,

'Lawyers were dependant for their knowledge of the contents

<sup>1</sup> *H. E. L.* ii. 220.

<sup>2</sup> *Introd. to Stat. R., apud Select Essays in Anglo-American Legal History*, ii. 178.

<sup>3</sup> Holdsworth, *H. E. L.* ii. 426.

<sup>4</sup> Ilbert, *Legislative Methods and Forms*, 26.

<sup>5</sup> *Stat. R.*, 1, App. A.

of the Statute Book upon judicial dicta, books of authority and the work of private persons, such as Pulton, Cay, Hawkins, and Ruffhead. In the absence of official publications, the learning of the bar and the enterprise of the law publisher employed upon the Statute Book and the reports, have exercised a very real censorship upon the sources of English law.<sup>1</sup>

No official collection of enactments was undertaken until the beginning of the nineteenth century, when the Record Commission published the great series of Statutes of the Realm. They derived their material from many different sources besides the Statute Rolls and the official Exemplifications and Inrolments, their object being to include all those instruments which had been 'for a long series of years referred to, and accepted as statutes in the courts of law'.<sup>2</sup> They found it impossible to assign degrees of authority to all these instruments, and expressly disclaimed any intention of doing so.<sup>3</sup> The fact is that the true authority for a great many of our early statutes is what Hale called the 'general received tradition' of the profession<sup>4</sup>—a tradition largely founded and fostered by learned editors and commentators.

This question of the source and authority of ancient statutes—the question, in short, of what *is* a statute in English law—is not of mere antiquarian interest. It may sometimes be of decisive importance in a modern action, especially an action concerned with real property. Thus in *Merttens v. Hill*, [1901] 1 Ch. 842, the lord of the manor of Rothley in Leicestershire claimed a customary fine of one shilling in the pound on the purchase-money paid by the defendant for certain property within the manor. The manor was of ancient demesne, and among other issues raised, the

<sup>1</sup> *H. E. L.* ii. 427.

<sup>2</sup> *Select Essays in Anglo-American Legal History*, ii. 177.

<sup>3</sup> *Ibid.*, *loc. cit.* Even in the selection of texts, and in the translations of some of the statutes, the Record Commission was far from impeccable; see Plucknett, *op. cit.*, ch. ii.

<sup>4</sup> *Hist. Com. Law*, ch. i *ad fin.*



learned judge (Cozens-Hardy J.) decided that the freehold of land held in socage in a manor of ancient demesne was in the tenant, not in the lord. One of the remaining questions which then arose was whether a fine of this kind could be imposed on a freeholder. In deciding that it could not, Cozens-Hardy J. relied partly on the Statute Quia Emptores, and partly on a statute of 8 Ed. II (1315). This latter was not printed in any collection, but was found in a Parliament Roll. It was held to be of full statutory authority, and inasmuch as it enacted 'that from henceforth none should demand or take any fine from freemen for entering upon the lands and tenements which are of their fee, so always that by such feoffment they be not losers of their services nor that their services be denied', the plaintiff's claim was adjudged inadmissible, even if proved as a custom (which it was not), as being contrary to statute.

Disorder  
of  
statutory  
records  
and  
attempts  
to reform  
it.

Uncertainty as to its authority cannot exist in regard to a modern Act of Parliament; but when we speak glibly of the 'statute-book' we do not always realize what a curiously formless document it is. Until the Statutes of the Realm were published, our enacted law was disorderly to an almost incredible degree. There were many projects for reforming it. It is said that the infant King Edward VI showed his precocity by a scheme for eliminating a great deal of matter which even in the sixteenth century had become redundant.<sup>1</sup> In 1557, Sir Nicholas Bacon, Lord Keeper, 'drew up a short plan for reducing, ordering, and printing the Statutes of the Realm' on the following general principles:

'First, where many lawes be made for one thing, the same are to be reduced and established into one lawe, and the former to be abrogated.—Item, where there is but one lawe for one thing, that these lawes are to remain in case as statutes.—Item, where part of one acte standeth in force and another part

<sup>1</sup> Ilbert, *op. cit.* 43.

abrogated, there should be no more printed but that that standeth in force.'

Similar schemes were advocated by James I and Francis Bacon, and the latter assisted in a commission for reform, besides outlining the principles on which it should be conducted.<sup>1</sup> The project was again canvassed during the Commonwealth and Restoration, but came to no fruition. No serious effort seems to have been made during the eighteenth century. Bentham<sup>2</sup> attacked the inconveniences of the existing system, and in this, as in so many other departments of the law, his criticisms were not without effect. The work of revision was seriously taken in hand in 1810, and between that date and 1822 the Record Commission published the statutes up to the end of the reign of Anne. But little attempt had been made so far to discard the accumulated lumber of centuries, and in the intricate maze of statutes repealed, partially repealed, and re-enacted in whole or in part, it was sometimes almost impossible to ascertain what the true statute law was on any obscure point. The most absurd results were sometimes produced. A statute 21 & 22 Vict. c. 26 was solemnly passed to repeal 6 Anne, c. 5 and 33 Geo. II, c. 20, both of which had been repealed by 1 & 2 Vict. c. 48.<sup>3</sup> In 1842, in the case of *Reg. v. G.W. Railway Co.*, 3 Q.B. 333, the Court of Queen's Bench carefully considered the statute 2 & 3 Ed. VI, c. 24, which had been repealed fourteen years previously. Counsel not infrequently went into Court relying on Acts which neither they nor the Judge knew, nor could reasonably be expected to know, had been abrogated.<sup>4</sup> At last a move was made for extensive

<sup>1</sup> *Select Essays*, ii. 169, and 170, n. 5, for references to Bacon's proposals.

<sup>2</sup> *Passim*: see especially *Of Nomography*, Works (ed. Bowring), iii. 234; *Justice and Codification Petitions*, v. 438.

<sup>3</sup> Holland, *Forms of the Law*, 122.

<sup>4</sup> Holland, *op. cit.* 154.

revision. A number of commissions sat from 1834 onwards, and though many of their recommendations never got beyond the stage of pious wishes, one result was a series of Statute Law Revision Acts which began in 1861 and got rid of an enormous quantity of obsolete matter. One Act of 1867 alone repealed 1,300 statutes.<sup>1</sup> This salutary process of expurgation has gone on more or less continuously up to the present time. The Revised Statutes were published 1870-85, and the second edition 1888-97. We now have reasonably manageable collections of legislation.<sup>2</sup> But we are still far off perfection, and much might yet be done to reduce the statutes to a more systematic form.

### III. FORCE OF LEGISLATION

The variety of legislative forms in the Middle Ages necessarily involved some uncertainty as to the binding authority of statutes or supposed statutes. In the early part of the fourteenth century it is not uncommon to find the Judges evading the provisions of statutes and sometimes refusing altogether to apply them, either for

1. *Growth of principle of binding force of statutes.*

<sup>1</sup> Holland, *op. cit.* 137.

<sup>2</sup> The following are the principal editions: *The Statutes of the Realm*, 1011-1713; *The Public General Acts*, 1714 to present day; *The Revised Statutes*, published under the direction of the Statute Law Committee, 1870-85, and second edition of the same, 1888-97; the annual volumes of statutes published with the Law Reports by the Incorporated Council for Law Reporting. Of the various series of *Statutes at Large*, the best known are those of Pickering, continued by Tomlin and Raithby to cover the period Magna Carta to 1870; another edition by Tomlin and Raithby in 39 vols. covering the same period; Ruffhead's edition, Magna Carta to 1801, and Runnington's edition of Ruffhead for the same period. Of abridged or annotated editions 'of practical utility' the most popular are *Chitty's Statutes*, *The Annual Statutes*, and *The Annotated Acts*. A general guide and reference index is supplied by the *Chronological Table and Index to the Statutes*. For the best known of the sources of the statutes from the earliest times see Winfield, *The Chief Sources of English Legal History*, 84 ff.

purely arbitrary reasons or at least for reasons of which the Year Book reports do not fully inform us.<sup>1</sup> Bereford C.J. seems to have taken as independent a line in this matter as in most others. Sometimes the doubt felt in Court was not as to the validity of the statute if it existed, but as to whether it existed at all in valid form; for example, great importance was attached to whether it had been sealed or not. Bereford declares that he 'knows nothing' of a certain statute of 20 Ed. I,<sup>2</sup> and 'if, indeed, the King should send us word that we are to take this ordinance for law, we will accept it, but never else'.<sup>3</sup> Apart from questions of authenticity, there seems to be little doubt that at this period and certainly before it the Judges reserved to themselves a discretion in the application of statutes. An Act or ordinance was undoubtedly of high authority, but was entitled to no extraordinary sanctity unless it amounted to direct royal command. This general attitude towards statute has led to a theory that the only law recognized as 'sovereign' was the fundamental Common Law, a body of unwritten tradition recognized as authoritative by Judges and by the profession generally; and that the sole aim and effect of medieval enactment was to strengthen, interpret, or regulate this fundamental law, but not to abrogate it or import novelties into it.<sup>4</sup> This theory goes too far and is not generally accepted.<sup>5</sup> There is every reason to believe that in the fourteenth century the Courts recognized a pre-eminent right in the king in Parlia-

<sup>1</sup> A number of striking examples are collected by Mr. Plucknett, *op. cit.* 66 ff.

<sup>2</sup> The so-called 'Statute of William Butler', *Stat. R.* i. 109.

<sup>3</sup> *Cayley v. Tattershall*, Y. B. 8 Ed. II (S. S. xvii), 116 and xlii ff. The exact forms of statutes and ordinances was still matter of controversy in the early seventeenth century, and much learning on the subject is collected in *The Prince's Case* (1605), 8 Rep. 1.

<sup>4</sup> McIlwain, *opp. cit.*

<sup>5</sup> Holdsworth, *H. E. L.* ii. 442, and *Sources and Literature of English Law*, 41 ff.; Plucknett, *op. cit.* 26 ff.

ment to introduce 'special law' and 'novel law'.<sup>1</sup> Nevertheless, it is only gradually that the Judges feel themselves to be bound strictly by the precise terms of an enactment and compelled to apply them without recourse to their own discretion. By the reign of Edward III there is a noticeable tendency to interpret statutes strictly and bow to their superior authority; but it is probably not till the end of the fifteenth century that anything like the modern doctrine of the absolute authority of statute has settled itself in our law.

2. *Supposed  
and real  
limitations  
on the  
force of  
statutes.*

The un-  
limited  
power of  
the  
legisla-  
ture.

Even so, it is not 'absolute' in the sense of being entirely unrestricted by any moral, social, or religious considerations and entirely obligatory upon the individual in all circumstances. It is an axiom of modern English law that the scope of legislation is 'legally unlimited'. Our institutional writers lay down the principle in the widest terms. 'Of the power and jurisdiction of the Parliament for making of laws', says Coke,<sup>2</sup> 'it is so transcendent and absolute as it cannot be confined either for causes or persons within any bounds.' Or again, Blackstone:<sup>3</sup>

'An act of parliament is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the King himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended or repealed, but in the same forms and by the same authority of parliament.'

The most modern exponents of our constitutional law state the principle in equally unqualified terms.<sup>4</sup> It

<sup>1</sup> In 1310 Ingham says *arguendo*: 'For one canon annuls divers *leges*, so also the Statute annuls divers things which were by the common law'; 'car un canoun defet plussours leis; auxi le statut defet plussours choses qe sunt a la comune lei': *Venour v. Blount*, Y. B. 3 & 4 Ed. II (S. S. iv), 162.

<sup>2</sup> 2 Inst., Proem.

<sup>3</sup> 1 Comm. 185.

<sup>4</sup> 'The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever;

goes without saying that we do not recognize the distinction, which exists in countries like France and America, between 'constitutional' and 'ordinary' laws; nor can any English statute be unconstitutional in the legal sense—the Courts have not the power, as they have in the United States, to refuse to apply it on the ground of unconstitutionality.

But the absolutely unlimited sovereignty of statute has not been admitted in the theory of our law until comparatively recent times. In the sixteenth and seventeenth centuries it would have required considerable audacity on the part of any lawyer to deny that the only ultimate, supreme authority lay in a law higher than any man-made law—the eternal dictates of natural justice, reason, or equity; or, in its theological aspect, the law of God. The theological doctrine is represented here, as everywhere, by St. German, who distinguished between the law of reason and the law of God, giving the latter, curiously enough, as the *second* 'ground of the law of England'. 'If any general custom', he says,<sup>1</sup> 'were made directly against the law of God, or if any statute were made directly against it: as if it were ordained that no alms should be given for no necessity, the custom and statute were void.' But the only examples he gives are those of statutes which do preserve 'the intent of the law of God': he produces no instance of a statute being overridden for violating that law. He is, in fact, thinking, in his characteristic canonical manner, of the connexion between common law and ecclesiastical law, and the rest of the discussion in this part of his treatise is concerned with that point.<sup>2</sup> The theological element dis-

Law of  
God.

<sup>1</sup> Ch. vi.

<sup>2</sup> The law of God was formerly much spoken of in connexion with incest. This offence, since it depended on the Levitical degrees rubricated by the Church, was purely ecclesiastical (see Stephen, *Hist. Crim.*

‘Right and reason’, ‘natural equity’, and ‘control of the Common Law’. appears in Coke in favour of ‘common right and reason’, and statute law becomes subject to that kind of fundamental, governing Common Law which has been already discussed. Coke’s words in *Bonham’s Case* (1610), 8 Rep. 114, 118, go to a remarkable length.

‘And it appears in our books, that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void.’

For this proposition he relies upon *Tregor’s Case*, Y.B. 8 Ed. III, 26, and not only misquotes an *obiter dictum* of Herle J., but seems to have entirely misunderstood the case, which is no authority whatever for the principle he states so widely. All his remaining examples are cases merely of strict interpretation which seem to have produced a result other than that intended by the legislator, but none of them can be considered as in any way supporting a general doctrine that the Courts

*Law*, ii. 430, where it is mentioned as ‘the only form of immorality which in the case of the laity is still punished by ecclesiastical courts’), and was not made a misdemeanour until 1908 (Punishment of Incest Act, 1908). It was therefore constantly described as being ‘prohibited by God’s law’ in the old statutes and in the learning thereon: see, e.g., 25 Hen. VIII, c. 22, and 28 Hen. VIII, c. 7 (afterwards repealed, 28 Hen. VIII, c. 16, 32 Hen. VIII, c. 38). The first-mentioned statute (s. 3) declares: ‘no man, of what estate, degree or condition soever he be, hath power to dispense with God’s laws, as all the clergy of the realm in the said convocations, and the most part of all the famous universities of christendom, and we also, do affirm and think.’ The same words occur in the statute 28 Hen. VIII, c. 7, s. 12. These statutes were considered in *Brook v. B.* (1861), 9 H.L.C. 193, and the modern view was stated by Lord Cranworth at p. 226: ‘We do not hold the marriage to be void because it is contrary to the law of God, but because our law has prohibited it on the ground of being contrary to God’s law. It is our laws which makes (*sic*) the marriage void, and not the law of God.’ See also *Reg. v. Chadwick* (1847), 11 Q.B. 205.

have any power to 'adjudge an Act to be void'.<sup>1</sup> Coke appears to have been the first to lay it down in terms, but it appears also in Hobart in the form that 'even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself, for *iura naturae sunt immutabilia*, and they are *leges legum*.'<sup>2</sup> The dictum, however, was not relevant to the decision, since it had been expressly decided that the custom alleged in the case did not fall within the customs of London confirmed by the Act in question. In 1701 Lord Holt cites the dictum in *Bonham's Case* as 'a very reasonable and true saying', on the point that no statute can make a man judge in his own cause; and adds, somewhat inconsequently, 'an act of parliament can do no wrong, though it may do several things that look pretty odd. . . . An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A to lie with the wife of B, but it may make the wife of A to be the wife of B and dissolve her marriage with A'.<sup>3</sup> In the eighteenth century the doctrine still lives on in juristic theory and is stated somewhat perfunctorily by Blackstone,<sup>4</sup> though not without protest from his editor, Christian; it is, indeed, inconsistent with the whole tenor of Blackstone's precepts concerning legislation, and seems to be added as a kind of pious after-thought.<sup>5</sup> All these statements in reality

<sup>1</sup> On these cases see Plucknett, *op. cit.* 68 ff.; Holdsworth, *H. E. L.* ii. 442; Pound, 'Common Law and Legislation', *H. L. R.* xxi. 383.

<sup>2</sup> *Day v. Savadge* (1615), Hob. 85, 87.

<sup>3</sup> *City of London v. Wood* (1701), 669, 687. <sup>4</sup> 1 *Comm.* 40.

<sup>5</sup> It is to be noted that he confines himself to the theological commonplace; the dicta of *Bonham's Case* he expressly rejects, and though he says that 'if there arise out of [statutes] collaterally any absurd consequences, manifestly contrary to common reason, they are, with regard to those collateral consequences, void', his subsequent explanation shows that the word *void* is incautiously used. What he says does not go to the authority and validity of the statute, but merely means that the Court will be astute to avoid interpretations which result in absurdity. He is, in fact, in two minds, and the passage shows clearly that in 1765 English jurisprudence had not reached a clear conclusion



amount only to affirmations of the fundamental justice and reasonableness which should underlie all law, statutory or other; there is not, so far as I am aware, a single example in our books of the Courts rejecting the plain and express provisions of a statute on the ground that it was contrary to any ethical principle. It is not, however, until 1871 that the Bench, taking the common example of a statute which makes a man judge in his own cause, is prepared to deny expressly any right in the Courts to question the authority of such an enactment. The Common Law no longer—if, as is highly doubtful, it ever did so—claims any power to ‘control’ statute. ‘It was once said’, says Willes J.,<sup>1</sup>

‘that if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. . . . The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.’

The true  
‘control  
of the  
Common  
Law’.

A general ‘control’ of the Common Law over statute is not, however, entirely meaningless even at the present time, though it certainly does not amount to a right to resist even the most revolutionary statute, provided it be clear in its intention. But there is a constant ‘control’ exercised by the interpretation of the Courts—to this we shall advert presently; and there is the dominant principle, never absent from the minds of Judges, that the Common Law is the wider and more fundamental, and that wherever possible, legislative enactment will be construed in harmony

on this point. 1 *Comm.* 90–1. He does, however, say in another place (*ibid.* 43) that ‘if any human law should allow or enjoin us to commit it (i. e. murder), we are bound to transgress that human law, or else we must offend both the natural and the divine’.

<sup>1</sup> *Lee v. Bude, &c., Ry. Co.* (1871), L.R. 6 C.P. 576, 582.

with established Common Law principles rather than in antagonism to them. A general intention is presumed in the legislature to fit new enactments into the general structure of the law and to effect no more change than the occasion strictly demands. In Coke's words, 'The surest construction of a statute is by the rule and reason of the common law.'<sup>1</sup> This principle has been criticized as conducing to a narrow and jealous interpretation, and as being entirely a modern innovation,<sup>2</sup> and doubtless it has sometimes led to strained and grudging constructions; but in reality it is an essential guiding rule, for without it the continuity of legal development would be gravely imperilled; and it becomes the more necessary when we remember how few statutes are complete and unprecedented innovations, and how many are extensions or modifications of existing Common Law rules. In modern law the principle is expressed in the familiar rule that statutes 'in derogation of the Common Law' are to be construed strictly. 'The general words of an Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched.'<sup>3</sup> Difficult though it may be to reconcile with the supreme dignity of the sovereign legislature, our Judges do not hesitate to assume—to put it plainly—that they know more about the law than Parliament! Though to a Continental lawyer it would sound impertinent, there is nothing incongruous in an English Judge's saying, 'We ought, in general,

<sup>1</sup> Co. Litt. 272 b. Cf. *Stowel v. Lord Zouch* (1564), Plowd. 353.

<sup>2</sup> Pound, *Common Law and Legislation*, *ubi sup.* The principle, though not, of course, the exact form of Coke's statement of it, is older than Professor Pound allows, as will be seen from what has been already said. In 1314 Staunton J. says: 'A statute does not alter common law unless it expressly purports to do so': *Bakewell v. Wandsworth*, Y. B. 6 & 7 Ed. II (*Eyre of Kent*) (S. S. viii), iii. 78; and see other examples *apud* Plucknett, *op. cit.* 128 ff.

<sup>3</sup> Per Romilly M.R., *Minet v. Leman* (1855), 20 Beav. 269, 278.

in construing an Act of Parliament, to assume that the legislature knows the existing state of the law.' <sup>1</sup> But sometimes it is perfectly plain that the legislature does *not* know the existing state of the law, or at all events states it in a singularly inaccurate manner. In a statute of 1873,<sup>2</sup> the following surprising statement will be found: 'Whereas a person who is accessory *before or after the fact*, or counsels, procures, commands, aids or abets the commission of any indictable offence, *is by English law liable to be tried and punished as if he were the principal offender*', &c.—a statement of the law which needs great modification so far at least as accessories after the fact are concerned. There are abundant examples of errors either of law or of fact contained in statutes.<sup>3</sup> How are the Courts to treat them? The Judicial Committee unequivocally affirms the discretion reserved to the Judge in such cases. 'The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence.'<sup>4</sup> It will be observed that the dictum is restrained to an *implication* arising from a statute; the Courts will not, if they can help it, allow any enactment to overrule existing Common Law *by inference*

<sup>1</sup> Per Lord Blackburn, *Young v. Leamington Spa* (1883), 8 App. Cas. 517, 526. Cf. Lord Halsbury L.C., *Ex p. Council of Kent, &c.*, [1891] 1 Q.B. 725, 728.

<sup>2</sup> Extradition Amendment Act, 36 & 37 Vict., c. 60, s. 3, amended by 58 & 59 Vict., c. 33; cited Maxwell, *Interpretation of Statutes* (6th ed.), 550. It must be said in extenuation that the statement is by way of preamble only.

<sup>3</sup> See Maxwell, *op. cit.* 541 ff.

<sup>4</sup> *Mollwo v. Court of Wards* (1872), L.R. 4 P.C. 419, 437. The enactment in question was the 28 & 29 Vict., c. 86, s. 1, which, it was contended, raised an implication that where money was advanced to a firm on the terms that the lender should receive a rate of interest varying with the profits, or a share of the profits, the lender was, before the passing of this Act, to be responsible as a partner.

merely. It is quite otherwise when the provision of the statute is express, or when there is a general clear intention to change the law, even though the legislature has chosen language which involves an erroneous statement, by way of recital, of the law.<sup>1</sup> It is not to be disguised, however, that when there is any reasonable pretext to justify them, the Courts will not carry out the probable intention of the legislature if to do so would be to follow a misconception of the law. This may be seen in the questions of sporting rights which have arisen under various Inclosure Acts. There existed for a long time 'a very mistaken notion',<sup>2</sup> that the lord of a manor had sporting rights over the waste lands of the manor by virtue of his seignory. It was a common practice in Inclosure Acts, when vesting the freehold of the allotted lands in the allottees, to introduce a saving clause which reserved to the lord a number of his manorial rights, including various sporting rights. The question then arose whether, after the inclosure, the lord had the right of shooting over the allotments which had now passed to other hands. It is difficult to doubt, though judicial opinion was somewhat divided on the point, that the intention of the legislature was to reserve this right among others; but that intention was founded on a misconception—a 'blunder', it is freely called in the cases—and the Judges refrained from carrying it out, holding that the right in question was territorial and not seigniorial—i. e. had been vested in the lord by virtue of his ownership of the soil in the waste, and did not pass with the seigniorial rights reserved.<sup>3</sup>

There is another kind of 'fundamental law', akin

International  
Law.

<sup>1</sup> *Reg. v. Mayor of Oldham* (1868), L.R. 3 Q.B. 474.

<sup>2</sup> Per Bayley J., *Pickering v. Noyes* (1823), 4 B. & C. 648; cf. *Martin B.*, *Bruce v. Helliwell* (1860), 5 H. & N. 609, 620.

<sup>3</sup> *Sowerby v. Smith* (1874), L.R. 9 C.P. 524; *Duke of Devonshire v. O'Connor* (1890), 24 Q.B.D. 468; *Ecroyd v. Coulthard*, [1898] 2 Ch. 358.

to the law of reason or of nature, which has sometimes been supposed to impose positive limits on the scope of legislation. I refer to International Law. A dictum of Lord Mansfield seems to suggest that in his opinion Parliament had no power to legislate in direct opposition to an established principle of the Law of Nations: 'The privileges of public Ministers and their retinue depend upon the Law of Nations, which is part of the Common Law of England. And the Act of Parliament 7 Anne, c. 12,<sup>1</sup> did not intend to alter, *nor can alter*, the Law of Nations.'<sup>2</sup> In the great case of *The Francoonia*<sup>3</sup> two Judges, Sir R. Phillimore and Kelly C.B., seemed to incline to the opinion that legislation could not override a rule of International Law, and the Chief Baron said:

'I hold that no one nation has the right to exercise criminal jurisdiction over the ships of other nations, or the subjects of other nations within such ships, navigating the high seas . . . unless by treaty, or express agreement, or unless by some uniform, general and long-continued usage, evidenced by the actual exercise of such jurisdiction acquiesced in by the nation or nations affected by it';

which would seem to exclude the validity of statute in such a case.<sup>4</sup> There have undoubtedly been cases in

<sup>1</sup> The Act imposed a penalty on anybody infringing the rule of International Law as to the immunity of the servants of ambassadors. Its curious political history is related by Lord Mansfield in *Triquet v. Bath* (1754), 3 Burr. 1478.

<sup>2</sup> *Heathfield v. Chilton* (1767), 4 Burr. 2015, 2016. Too much, however, has been made of the dictum (see Pound, *op. cit.*). Lord Mansfield seems only to mean that whatever municipal legislation might be, the rule of International Law would remain the same: he does not suggest that the municipal law would be invalid and unenforceable. The dictum is in any case very casual, as it was held that the Act in question, far from being contrary to International Law, was declaratory of it.

<sup>3</sup> *Reg. v. Keyn* (1876), 2 Ex. D. 63.

<sup>4</sup> The head-note to the case represents the view of these two Judges as follows: 'That, by the principles of international law, the power of a nation over the sea within three miles of its coasts is only for

which the Courts have greatly restrained the effect of widely expressed statutes in order to preserve consistency with International Law. Perhaps the strongest example is the construction put upon the Acts of 1807 and 1811 prohibiting the slave-trade.<sup>1</sup> These enactments, as is well known, were passed as the result of a strong humanitarian movement, and were expressed in very general and emphatic language which might have been construed to mean that Englishmen could with impunity prevent the slave traffic even if carried on by the subject of a State which recognized the traffic as lawful. This, however morally commendable, would have violated an elementary principle of International Law; and in *Madrazo v. Willes* (1820), 3 B. & Ald. 353, the Court of King's Bench, with regret but without hesitation, so narrowed the statutes that a Spaniard was enabled to recover very large damages in an English Court for interference at Havana with his slave ship and traffic.<sup>2</sup> On the other hand, in questions of jurisdiction over crimes committed in English ships, whether in British waters or abroad, our Courts have not hesitated to depart from a well-recognized rule of International Law; and this they are prepared to do not only on the authority of statute, but even of a Common Law rule.<sup>3</sup> It cannot now be seriously contended that the so-called restrictive force of International Law goes further than this, that 'every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law';<sup>4</sup> but 'if the legislature of England in certain limited purposes; and that *Parliament could not*, consistently with those principles, apply English criminal law within those limits.' But this is not stated in terms in either of the judgements.

<sup>1</sup> 47 Geo. III, c. 36, 51 Geo. III, c. 23.

<sup>2</sup> Cf. *Forbes v. Cochrane* (1824), 2 B. & C. 448; *Santos v. Illidge* (1860), 8 C.B.N.S. 861.

<sup>3</sup> *Reg. v. Anderson* (1868), L.R. 1 C.C.R. 161; *Reg. v. Keyn*, *ubi sup.*

<sup>4</sup> Maxwell, *op. cit.* 262.

express terms applies its legislation to matters beyond its legislative capacity, an English Court must obey the English legislature, however contrary to international comity such legislation may be'.<sup>1</sup>

Apart from these supposed limitations, which modern doctrine has reduced to very slender proportions, certain principles, now well recognized, do in effect limit the scope of legislation, though they cannot be said to derogate from the strict constitutional theory of the absolute authority of Parliament.

1. It 'neither requires nor is capable of proof' that a statute cannot decree what is physically impossible. Somewhere in the interstices of our statute-book, there may be an example of an Act ordering that which, at the time it passed, was impossible to be performed; it is not difficult to imagine such circumstances, but I do not know of any instance of this *antecedent* or *contemporaneous* impossibility.<sup>2</sup> *Subsequent* impossibility is another matter. A statutory rule may be perfectly reasonable and practicable in its general application, but in a particular instance, owing to inevitable circumstances, it may be impossible for an individual to comply with it. The maxim *lex non cogit ad impossibilia* then applies, and an exception is made at the discretion of the Court.<sup>3</sup>

2. 'No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation,<sup>4</sup> otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.' If

<sup>1</sup> Per Brett L.J., *Niboyet v. N.* (1878), 4 P.D. 1, 20.

<sup>2</sup> Something not unlike it occurs in the Newspaper Libel and Registration Act, 1881, which by its 9th section required printers to make certain returns before 31st July 1881. The Act was not passed till 27th August of that year. Maxwell, *op. cit.* 740.

<sup>3</sup> Maxwell, *op. cit.* 673 ff.

<sup>4</sup> The same presumption exists against the retrospective conferment of rights and privileges; see *Smith v. Callender*, [1901] A.C. 297, 303.

the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.<sup>1</sup> What is true of the construction of statutes is also true of their making. There is in all civilized states the strongest prejudice against retrospective or *ex post facto* legislation, as being, in the words of Willes J., '*prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'.<sup>2</sup> However, this great Common Law authority is quite clear that there is no principle known to the law which actually prohibits such legislation. Nor is there any objection to it when it operates *for the protection* of an individual or individuals. Legislation of this kind has not been infrequent: Acts of Indemnity are the best-known example. It is one of the disadvantages of case-law that, since it declares the law which is and which was, its effect may be very inconveniently retrospective; and sometimes the legislature has to step in for the benefit of persons who are prejudicially affected by this retrospective operation. To take a recent example: early in 1921 it was decided<sup>3</sup> that Divorce Courts in India had no jurisdiction to decree dissolution of a marriage between parties not domiciled in India. The result was that a number of British subjects who, having been married in India and having resided there but without acquiring actual domicile, had obtained decrees of dissolution from Indian Courts, were not really divorced at all, and those of them who had married again had undoubtedly committed bigamy. Parliament at once intervened to

<sup>1</sup> Per Wright J., *In re Athlumney*, [1898] 2 Q.B. 547, 551. Cf. Kennedy L.J., *West v. Gwynne*, [1911] 2 Ch. 1, 15.

<sup>2</sup> *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, 23.

<sup>3</sup> *Keyes v. K.*, [1921] P. 204.



validate all such divorces retrospectively.<sup>1</sup> But an Act to penalize an individual, or to make that unlawful which was lawful when it was done, would now be regarded so unfavourably that it may be considered for all practical purposes as prohibited.<sup>2</sup> This, of course, does not mean that a statute may not sometimes operate hardly on vested rights, but never more than a strict interpretation can prevent.

Non-  
repeal.

3. No statute can make itself absolutely secure against repeal. There is nothing to prevent any Parliament enacting that a particular statute shall never in any circumstances be altered or abrogated, and at certain troubled periods of history, such seems to have been the intention of the legislators.<sup>3</sup> But equally there is nothing to prevent any subsequent Parliament treating such a provision as *pro non scripto*. In any enlightened government, an unrepealable statute is a

<sup>1</sup> Indian Divorces (Validity) Act, 1921.

<sup>2</sup> In the United States, *ex post facto* legislation is expressly prohibited by the Constitution, Art. I, s. 9 (3). *Privilegia*, in the shape of Acts directed *against* individuals, are now unknown, though in the past they have taken the form of Bills of Attainder or Bills of Pains and Penalties. Public Acts for the *benefit* of specific individuals have sometimes occurred: the most famous case in our constitutional history is that of the 4 Hen. VIII, c. 8, passed to annul the conviction in *Strode's Case* (1512), and usually regarded as the charter of free speech in Parliament. Such measures still occur occasionally: see 15 Geo. V, c. 7, 'An Act to indemnify and relieve William Preston, Esquire, from any penal consequences which he may have incurred or suffered by sitting or voting as a member of the House of Commons during a time when he was executing, holding or enjoying a contract, agreement or commission made or entered into with the Postmaster-General'. Acts of Indemnity to validate measures for public safety taken in time of emergency have been frequent, though it is still debated whether they add anything to Common Law rules as to martial law. The most recent is the Indemnity Act, 1920 [as to Ireland, Restoration of Order in Ireland (Indemnity) Act, 1923]. Lord Atkinson, in *R. v. Halliday*, [1917] A.C. at p. 274, dissents from the principle 'that statutes invading the liberty of the subject should be construed after one manner, and statutes not invading it after another'.

<sup>3</sup> For examples see Dicey, *Law of the Constitution*, ch. i, and 1 Bl. Comm. 90.

contradiction in terms, striking at the very root of legislative theory. Its practical dangers are also manifest, for it turns the ordinary process of legislation into a constitutional issue so grave as to involve the danger of disorder or even revolution. Yet laws of this kind are not unknown in some countries even at the present day. Thus in 1884 the Assemblée Nationale added to the French Constitution a provision that the republican form of government could not be made the subject of a proposal for revision. France is unlikely to repeal this enactment, but should she ever have occasion to do so, the ordinary process of law would have to be supplanted by more violent *de facto* expedients.

4. The real and actual, though not the legal, restraint upon legislation is the public opinion of the country at large. Despite recent theories to the contrary,<sup>1</sup> few modern communities have yet reached a stage at which laws are the creation solely of the individuals who happen to compose the legislative body. Legislators are still representative enough to be unable to flout the main currents of contemporary opinion.

Public  
opinion.

#### IV. SCOPE AND DURATION OF LEGISLATION

Such being the scope of the subject-matter of statute, we must next inquire as to the scope of its operation.

As early as 1365 it is laid down judicially that 'every one is bound to know what is done in Parliament, even although it has not been proclaimed in the country; as soon as Parliament has concluded any matter, the law presumes that every person has cognizance of it, for Parliament represents the body of the realm'.<sup>2</sup> In days when communication was difficult and writing the privilege of few, this rule was one which might work hardly, and the promulgation of

1. *Pro-  
mulgation.*

Former  
rules as  
to pro-  
mulga-  
tion.

<sup>1</sup> See, e. g., Duguit, *Law in the Modern State* (trans. Laski), ch. iii, *post*, p. 339.

<sup>2</sup> Thorpe C. J., *R. v. Bishop of Chichester*, Y. B. 39 Ed. III, 7; cited in abridged form, 4 Inst. 26.

statutes was a problem of no small difficulty. Down to the reign of Henry VII, the statutes passed in a session were sent to the sheriff of every county with a writ requiring him to proclaim them throughout his bailiwick and to see to their observance.<sup>1</sup> Soon after the introduction of printing, statutes began to be promulgated in print, the first dating from 1484.<sup>2</sup> But their distribution and publicity was extremely defective, and gave rise to severe strictures. Hobbes, for example, waxed indignant at the difficulties confronting the layman in ascertaining the law. 'If you had said', he declares,

'that no act could pass without their (the subjects) knowledge, then indeed they had been bound to take notice of them; but none can have knowledge of them but the members of the houses of Parliament; therefore the rest of the people are excused. Or else the knights of the shire should be bound to furnish people with a sufficient number of copies, at the people's charge, of the acts of Parliament, at their return into the country; that every man may resort to them, and by themselves, or friends, take notice of what they are obliged to. For otherwise it were impossible they should be obeyed: and that no man is bound to do a thing impossible, is one of Sir Edward Coke's maxims at the common-law. I know that most of the statutes are printed; but it does not appear that every man is bound to buy the book of statutes, nor to search for them at Westminster or at the Tower, nor to understand the language wherein they are for the most part written.'<sup>3</sup>

He concludes that there ought to be as many copies of statutes abroad as of the Bible! Blackstone<sup>4</sup> lightly passes over the difficulty by the transparent sophistry that the people are present 'by their representatives' at the passing of the Acts, and must therefore be taken to know them. It was not till the end of the eighteenth century that any attempt was made at systematic pro-

<sup>1</sup> 4 Inst. 26, 28; 1 Bl. Comm. 184.

<sup>2</sup> Record Commission, *Select Essays in Anglo-American Legal History*, ii. 203.

<sup>3</sup> *Works* (ed. Molesworth), vi. 27.

<sup>4</sup> 1 Comm. 184.

mulgation. In 1796 it was ordered that the printed statutes should be distributed throughout the realm as speedily as possible after enactment. Soon after the Act of Union, it was resolved by the Commons that the King's Printer should publish not less than 5,000 copies of each Public General Act, and 300 copies of such local and personal Acts as were printed.<sup>1</sup> Until 1793<sup>2</sup> the position was made worse by what Christian calls the 'flatly absurd and unjust rule'<sup>3</sup> that every statute, unless a date was fixed for its operation, took effect from the first day of the session in which it was passed; and it might therefore result, in contravention of the rule against retrospective penalties, that 'all who, during a long session, had been doing an act, which at the time was legal and inoffensive, were liable to suffer the punishment prescribed by the statute'.<sup>4</sup> The present rule is that as soon as a statute has received the royal assent, unless a date is fixed for its operation (as is frequently done), (1) the Courts will at once take judicial notice of it; (2) it is binding on all the king's subjects at once.<sup>6</sup> This application of the rule *igno-*

Present  
rules as to  
promulga-  
tion.

<sup>1</sup> Record Commission, *op. cit.* ii. 205.

<sup>2</sup> 33 Geo. III, c. 13.

<sup>3</sup> Note to 1 Bl. *Comm.* 70.

<sup>4</sup> Christian, *loc. cit.*

<sup>5</sup> Interpretation Act, 1889, s. 9. But judicial notice is confined to public Acts: local and private Acts must be proved. As to 'presumption of loss' of a private Act see *Harper v. Hedges*, [1924] 1 K.B. 151. In the United States the better opinion is that all statutes must be proved, though there has been some judicial conflict on the point; see Gray, *Nature and Sources of the Law*, 168 ff.

<sup>6</sup> In some countries operation is delayed for a stated interval—e. g. in Germany, 14 days. In France, by *Code Civ.*, Art. 21, laws are effectual as soon as promulgated, but the matter is now governed by various statutes and decrees of 1870 and onwards. The statute must first be officially promulgated by the President within a month of its being sent to him by the Government in its definitive form. It is then published in the *Journal Officiel*. In Paris it becomes obligatory one day after this publication; in all other parts of France, one day after its arrival at the *chef-lieu* of the *arrondissement*. Prefects and sub-prefects must take steps to notify it by printing and posting in suitable places. See Duguit, *Manuel de Droit Constitutionnel*, § 139;

*rantia iuris neminem excusat* at first sight seems harsh, and it is indubitable that in some cases strange consequences follow from it. In *Tomlinson v. Bullock* (1879), 4 Q.B. D. 230, the Court had to consider the effect of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), which enabled any unmarried woman who should be delivered of a bastard child 'after the passing of this Act' to apply for an affiliation order. The Act received the royal assent on 10th August 1872, and came into immediate operation. The appellant's bastard child was born on 10th August 1872, and it was held that the affiliation order might be granted in respect of a child born at any time on the day of 10th August.<sup>1</sup> But in practice the rule of *ignorantia iuris* is plainly necessary as a matter of utility, and it may be doubted whether many substantial hardships result from it. Most people become acquainted with the statute or Common Law which affects them specially in their particular vocations or circumstances. It may also be doubted whether any artificial expedients would increase the public taste for the reading of statutes. It is, however, a serious inconvenience at the present time that a great deal of subordinate and local legislation is in forms by no means easy of access.<sup>2</sup>

2. *Repeal.* Once having come into operation, the statute remains effectual until repealed. The repeal may be express or implied.

Express repeal. Express repeal seems at first sight to be simple enough, but we have seen that until a systematic effort was made to revise the statute-book, it was not always easy to tell what statutes still remained in force when there had been a long course of legislation on the same subject. With respect to all Acts passed before 1850,<sup>3</sup> Colin et Capitant, *Cours Élémentaire de Droit Civil Français*, i. 42 ff. The account given in J. C. Gray, *op. cit.*, is obsolete.

<sup>1</sup> The classic example, too well known to need repetition here, is *R. v. Bailey* (1799), R. and R. 1.

<sup>2</sup> *Post*, pp. 307 ff.

<sup>3</sup> Interpretation Act, 1889, s. 11.

the position was greatly complicated by the Common Law rule<sup>1</sup> that when an Act was repealed, and the repealing statute itself was subsequently repealed, the first Act was revived as from the original time of its commencement. The effect of repeal, cross-repeal, and revival has sometimes created a legal maze through which Judges have had great difficulty in picking their way. A good illustration is afforded by the curious antiquated law which still governs the duty of attendance at the parish church. The Act of Uniformity, 1552, provided that

‘all and every person and persons inhabiting within this realm, or any other the King’s majesty’s dominions, shall diligently and faithfully (having no lawful or reasonable excuse to be absent) endeavour themselves to resort to their parish church or chapel accustomed; or upon reasonable lett thereof, to some usual place where common prayer and such service of God shall be used in such time of lett, upon every Sunday, and other days ordained and used to be kept as holydays, and then and there to abide orderly and soberly during the time of the common prayer, preaching or other service of God there to be used and ministered; upon pain of punishment by the censures of the Church.’

This Act, together with others of an ecclesiastical nature, was repealed by Mary, but was re-enacted by 1 Eliz. c. 2, with the addition that anybody failing to comply with it was to be fined one shilling for each unexcused absence from divine service. By the Toleration Act of 1689 (1 Wm. & Mary, c. 18) the penalties of the previous legislation were not to be imposed on dissenters (except Roman Catholics), provided they went through certain forms on Sunday. In 1846 came the Religious Disabilities Act (9 & 10 Vict. c. 59), which repealed the statute of Elizabeth, *but did not repeal the statute of Edward VI*; and provided that nobody dissenting from the Church of England should

<sup>1</sup> 2 Inst. 686, 4 Inst. 325.

be liable to *any penalties at all*. The result at the present time is that dissenters are not liable to any penalties for non-attendance at the Established Church, but Laodicean members of the Church of England, though relieved of Elizabeth's shilling fine, are liable to spiritual censures for every unjustified absence from divine service on Sundays and other appointed days; i. e. they may be admonished by an Ecclesiastical Court and made to pay the cost of the proceedings.<sup>1</sup>

Repeal by  
implication.

Repeal by implication is a matter of construction, and is a very striking instance of 'control' exercised by the Courts over the operation of statute. It is a Common Law rule that *leges posteriores priores contrarias abrogant*.<sup>2</sup>

'If two inconsistent Acts be passed at different times, the last must be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every Act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every Act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment.'<sup>3</sup>

Though in every well-drafted modern statute an attempt is made by a repealing schedule to fit the enactment into the scheme of previous legislation, it is impossible to carry out this task with complete consistency; and the process of logical reconciliation constantly employed by the Courts is a very real supervision over the operation of statute-law.

3. *Desuetude*.

Age cannot wither an Act of Parliament, and at no time, so far as I am aware, has it ever been admitted in our jurisprudence that a statute may become inoperative through obsolescence.<sup>4</sup> Nothing but repeal

<sup>1</sup> See *Taylor v. Timson* (1888), 20 Q.B. D. 671.    <sup>2</sup> 2 Inst. 685.

<sup>3</sup> Per Lord Langdale, *Dean of Ely v. Bliss* (1842), 5 Beav. 574, 582.

<sup>4</sup> An attempt—unsupported, *me iudice*, by adequate evidence—is

and revision can disembarass the law of the considerable quantity of matter which nobody nowadays would dream of putting into effect. We have just seen that a parishioner (a term including nearly all inhabitants of the kingdom) is liable to punishment for not attending church. A short time ago a case of great public and political importance reminded us that the savage penalties of *praemunire* are still in existence, and nothing short of a *privilegium*, in the shape of an Act of Indemnity, was able to save two Cabinet Ministers from those penalties.<sup>1</sup> It is still a capital offence to destroy any of the king's victualling stores.<sup>2</sup> Persons who slaughter horses or cattle without a licence are still liable to flogging.<sup>3</sup> The ducking-stool is still a legal punishment for a common scold.<sup>4</sup> 'To this day', writes Stephen,<sup>5</sup> 'there is no legal reason why any Ecclesiastical Court in England should not try any person for adultery or fornication and enjoin penance upon them, to which they must submit under pain of six months' imprisonment.'<sup>6</sup> But perhaps the most striking survival at the present time is afforded by the disabilities which, despite the various Roman Catholic Relief Acts, still rest upon members of that faith. By the 3 & 4 Ed. VI, c. 10 (repealed 1 Mar. st. 2, c. 2, but restored 1 Jas. I, c. 25) all books used for church services except the

made to show that this rule has not always been recognized, in J. C. Gray, *op. cit.* 194 ff. Coke's cryptic rule that 'if a statute in the negative be declarative of the ancient law, that is, in affirmance of the Common Law, there as well as a man may prescribe or allege a custom against the Common Law, so a man may do against such a statute, for as our author saith, *Consuetudo etc. privat communem legem*' (Co. Litt. 115 a); and indeed the whole of his distinction between statutes 'in the negative and in the affirmative'; have met with such general disfavour that it seems hardly profitable to discuss them.

<sup>1</sup> *Rex v. Sec. of State for Home Affairs, Ex p. Art O'Brien*, [1923] 2 K.B. 361.

<sup>2</sup> Dockyards, &c., Protection Act, 1772; Maxwell, *op. cit.* 737.

<sup>3</sup> Knackers Act, 1786; Maxwell, *loc. cit.*

<sup>4</sup> 1 Hawk., c. 75, s. 14; Maxwell, *loc. cit.*

<sup>5</sup> *Hist. Crim. Law*, ii. 428. <sup>6</sup> By 53 Geo. III, c. 127, ss. 1-3.



Book of Common Prayer (of that date), and all 'images of stone, timber, alabaster or earth, graven, carved or painted', are to be destroyed or defaced, and if those persons (mayors, bishops, &c.) who are made responsible by the Act for destroying them fail to do so, they are liable to a fine of £40. By the 1 Geo. I, c. 50, the estates of 'popish recusants', and estates given to superstitious uses, are forfeited, and vested in the Crown for the use of the public. By the 11 Geo. II, c. 17, s. 5, every grant of an ecclesiastical living made by any Papist, unless to a Protestant purchaser for valuable consideration, and every devise of an ecclesiastical living made by a Papist, are void. The establishment or endowment of any Roman Catholic order in England is illegal, being (s. 17) specially excepted from the relief given to Roman Catholics by the 31 Geo. III, c. 32. By the 10 Geo. IV, c. 7, s. 26, any Roman Catholic ecclesiastic officiating, or wearing the habits of his order, except in the usual places of worship of the Roman Catholic religion, or in private houses, is liable to a penalty of £50. By the same Act, all Jesuits or members of other Roman Catholic orders and communities are bound to register themselves, any foreign Jesuit, &c., coming into the realm from abroad, except by licence, is liable to be banished, and any proselytizing by Jesuits, &c., is made a misdemeanour punishable (for both missionary and convert) by banishment or transportation for life. Roman Catholic charities do not enjoy the same privileges and exemptions as other charities, and are not allowed the abatements of income-tax applicable in ordinary cases. These disabilities, which, though the majority of them have no practical meaning nowadays, are absurd even as inanimate parts of our law, have recently been before Parliament, and at the time of writing a Bill to rectify them is in progress.<sup>1</sup> In all these cases the balance is preserved between Common Law and common sense,

<sup>1</sup> Roman Catholic Relief Bill (16 Geo. V, Bill 100).

and between statute and public opinion. Disuse, though it may not abrogate it legally, renders the obsolete rule of little or no practical efficacy. Occasionally, as in the celebrated case of trial by battle,<sup>1</sup> outworn institutions are revived in a startling and dramatic manner, and the legislature then has to step in; but for the most part it cannot be said that society suffers seriously from the persistence of obsolete rules of law. There is, however, this difference between Common Law and statute, that ancient Common Law rules always have the capacity to adapt themselves gradually to new forms, whereas a statutory rule, once reduced to words, remains unadaptable for all time.

## V. INTERPRETATION OF LEGISLATION

The operation of statute is not automatic, and can never be so. Like all legal rules, it has to operate through application—in other words, through the interpretation of the Courts. The interpretation of statute is a science by itself, and it would be far beyond the scope of this book to attempt anything like an exhaustive survey of it. We cannot do more than glance at the leading principles and their general effect on this source of law.

Nowhere is it more apparent than in the construction of enactments that words ‘half reveal, and half conceal, the thought within’. Unfortunately a statute must be all revelation, and not at all concealment, if it is not to lead to a darkening of counsel. In their task of *literal or grammatical* interpretation Judges are constantly reminded, to their unfeigned chagrin, of the imperfections of human language. The ‘style’ of statutes has differed greatly from age to age. From the laconic and often obscure terseness of our earliest statutes we swung to a verbosity which succeeded only in concealing the

1. *Literal interpretation.*

‘Style’ of statutes.

<sup>1</sup> *Ashford v. Thornton* (1818), 1 B. & Ald. 405.

real matter of the law under a welter of superfluous synonyms. Nowadays the ideal aimed at is the minimum of words consistent with clearness, proceeding, so far as possible, one step at a time without involutions and cross-references. It is difficult to lay down any invariable scientific principles for legislative diction. Probably nothing more sensible has been said on the subject than by Montesquieu.<sup>1</sup> His rules may be epitomized as follows:

Montes-  
quieu's  
principles.

1. The style should be both concise and simple: grandiose or rhetorical phrases are merely distracting surplusage.

2. The terms chosen should, as far as possible, be absolute and not relative, so as to leave the minimum of opportunity for individual differences of opinion.

3. Laws should confine themselves to the real and the actual, avoiding the metaphorical or hypothetical.

4. They should not be subtle, 'for they are made for people of mediocre understanding; they are not an exercise in logic, but in the simple reasoning of the average man'.

5. They should not confuse the main issue by any exceptions, limitations, or modifications, save such as are absolutely necessary.

6. They should not be argumentative; it is dangerous to give detailed reasons for laws, for this merely opens the door to controversy.

7. Above all, they should be maturely considered and of practical utility, and they should not shock elementary reason and justice and *la nature des choses*; for weak, unnecessary, and unjust laws bring the whole system of legislation into disrepute and undermine the authority of the State.<sup>2</sup>

Drafting.

Whether or not these admirable principles are observed depends on the particular draftsman; and

<sup>1</sup> *L'Esprit des Lois*, xxix, ch. 16.

<sup>2</sup> Some useful principles for the language of statutes are to be found in Halsbury, *L. of E.* xxvii, §§ 416 ff.

drafting is a matter which we have treated in an extraordinarily casual manner. Until 1869 every Government department employed its own draftsmen, and the result was a great deal of overlapping and confusion.<sup>1</sup> Nowadays, practically the whole work is done by Parliamentary Counsel to the Treasury and his small staff of assistants. Their task is not enviable;<sup>2</sup> anybody who has ever attempted it knows how extremely difficult it is to frame legal rules in unexceptionable terms. To demand perfection of expression and sense is to demand perfection not only of human foresight but of human language; and the fact that this is unattainable is one of the most serious drawbacks of Statute Law. This defect may be inevitable, but that only makes it all the more inherent in the very nature of legislation. Judges have suffered much, and continue to suffer much, from bad drafting. In 1857 we find Lord Campbell commenting severely on 'an ill-penned enactment, like too many others, putting Judges in the embarrassing situation of being bound to make sense out of nonsense, and to reconcile what is irreconcilable'.<sup>3</sup> In 1835 the First Report of the Statute Law Commissioners was equally frank:

'The imperfections in the statute law arising from mere generality, laxity or ambiguity of expression, are too numerous and too well known to require particular specification. They are the natural result of negligent, desultory and inartificial legislation; the statutes have been framed extemporaneously, not as parts of a system, but to answer particular exigencies as they occurred.'

At the present time, judicial complaints increase in proportion as legislation grows. 'No one can be certain about the meaning of a section like the one we

<sup>1</sup> Ilbert, *op. cit.*, ch. v.

<sup>2</sup> It is complicated by the fact that amendments, for which the draftsmen themselves are not responsible, are often made and accepted hastily during the passage of a Bill through Parliament.

<sup>3</sup> *Fell v. Burchett*, 7 E. & B. 537, 539.

have to construe,' says the Master of the Rolls of a recent enactment,<sup>1</sup> 'and I do not profess to feel certain about it.' Of the Income Tax Acts, which engross so much of the time of the Courts, Judges speak with undisguised despair. 'I do not pretend', says Lord Buckmaster,<sup>2</sup>

'that the opinion I hold rests on any firm logical foundation. Logic is out of place in these questions, and the embarrassment that I feel is increased with the knowledge that my views are not shared by other members of the House, but this fact is not surprising. It is not easy to penetrate the tangled confusion of these Acts of Parliament, and though we have entered the labyrinth together, we have unfortunately found exit by different paths.'

And in the same strain Lord Carson :

'I think it is open to comment that the learned Judge who heard this case was of one opinion and in the Court of Appeal two of the three Lords Justices were of a different opinion, whilst in your Lordships' House two noble and learned Lords differ from the other three ! That shows how unfortunate the Legislature has been in its attempt to clearly impose a tax upon the subject.'

Difficulties of  
literal  
interpretation.

It is self-evident that no invariable rule can be established for literal interpretation. A number of statutes have laid down certain primary principles and have precisely defined certain terms of frequent recurrence. Eight such statutes were repealed by the Interpretation Act, 1889, which consolidates the main principles and supplies standing definitions for the most ordinary stock-in-trade of the draftsman. This, however, amounts only to general guidance. So long as words are different, interpretations of them will be different. The

<sup>1</sup> Agriculture Act, 1920 : *In re Arden and Rutter's Arbitration*, [1923] 2 K.B. 865, 869 ; and cf. Warrington L.J. at p. 874.

<sup>2</sup> *G.W. Ry. Co. v. Bater*, [1922] 2 A.C. 1, 11.

<sup>3</sup> *Wankie Colliery Co. v. Inland Revenue Commissioners*, [1922] 2 A.C. 51, 71. Cf. Scrutton L.J. on 'lazy and unintelligent' legislation, *R. v. Secretary of State for Home Affairs*, [1923] 2 K.B. 361, 384.

Divisional Court of the King's Bench is constantly considering the meaning of single words in special cases stated by magistrates, and if space permitted, we might find much entertainment in detail, though little instruction in principle, in examples of their reasoning and the surprising results sometimes reached. Some statutes have given rise to an almost illimitable amount of minute literal interpretation. The Statute of Frauds will occur to every lawyer as a conspicuous and a melancholy example.<sup>1</sup> A single phrase in the Workmen's Compensation Act, 1908, 'an accident arising out of and in the course of his employment', has been the parent of many hundreds, possibly thousands, of cases. Since the Increase of Rent and Mortgage Interest (Restriction) Act (10 & 11 Geo. V, c. 17) was passed in 1920, the Courts almost every day have been hearing actions which turn on the construction of words and phrases in the Act. For example, quite a number of cases in the County Courts, and at least one in the Court of Appeal,<sup>2</sup> have been concerned with the problem whether linoleum can be considered as furniture. Imagination falters before the amount of literal interpretation which is yet to arise out of the Law of Property Acts which became operative on 1st January 1926.

Words, it need hardly be added, are meaningless in isolation, and their context must always be regarded. Hence the well-known rule of *eiusdem generis*—i. e. that when 'general words' are used in a summarizing or comprehensive manner, they must be taken as referring only to those kinds of things with which the context deals explicitly or implicitly.<sup>3</sup> We have seen that the

Context.

<sup>1</sup> See *L. Q. R.* xliii, 1 ff.

<sup>2</sup> *Wilkes v. Goodwin*, [1923] 2 K.B. 86. 'Whatever confidence I may have in my own judgement in other branches of the law, I never give a decision upon the Rent Restrictions Acts with any confidence': per Scrutton L.J., *Dunbar v. Smith*, [1926] 1 K.B. 360, 364.

<sup>3</sup> Maxwell, *op. cit.* 583 ff. For a modern example see *A.-G. v. Brown*, [1920] 1 K.B. 773 (reversed, owing to legislative change, [1921] 3 K.B. 29).

Courts will correct a mistaken view of the law taken by the legislature: *a fortiori* they will correct words used wrongly or unintelligently in a statute, provided the error be patent and not latent.<sup>1</sup> These are simple rules for the reasonable use of language. They do not constitute any peculiar legal cult; the method of interpretation is the same as is used by any intelligent person in the construction of written words.

2. *The ratio legis.*

•

The 'golden rule'.

As precedent is only an instrument of judicial logic, and serves as a means to the ascertainment of a principle, so literal construction is only an instrument of the same process, and serves for the ascertainment of the *general purport* of the statute, or *ratio legis*. This is the so-called 'golden rule' of all statute interpretation, formulated in a very well-known dictum of Parke B.:

'It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.'<sup>2</sup>

Another great Common Law Judge says:

'The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver.'<sup>3</sup>

Time and again the Courts reiterate this principle, that the expression of the will of the legislator must be

<sup>1</sup> Maxwell, *op. cit.* 446. For examples in French law see Géný, *Méthode d'Interprétation*, i. 252.

<sup>2</sup> *Becke v. Smith* (1836), 2 M. & W. 191, 195.

<sup>3</sup> Per Tindal C.J., *Sussex Peerage Case* (1844), 11 Cl. & F. 85, 143. Hereon see Lord Macnaghten, *Vacher v. London Society of Compositors*, [1913] A.C. 107, 118, and Buckley L.J., *In re Vexatious Actions Act*, 1896, [1915] 1 K.B. 21, 26.

considered not only by itself, *but with the natural consequences flowing from it*,<sup>1</sup> and it would merely weary the reader to cite the many dicta in this sense.

But the principle is by no means easy of application. Its application. Everybody admits that the *ratio legis* must be kept steadfastly in view. Even Austin, whose oft-reiterated theme is that the subject's sole duty towards sovereign legislation is to accept it, cannot escape the extreme importance of the *ratio legis*. He defines it as 'the scope or determining cause of a statute law: that is to say, the end or purpose which determines the lawgiver to make it, as distinguished from the intent or purpose *with which* he actually makes it'.<sup>2</sup> The 'end or purpose' must not only be ascertained, but must be interpreted as reasonably as possible. What used to be called commonly 'the equity of a statute' is translated into modern parlance in this form: 'In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles should, in all cases of doubtful significance, be presumed to be the true one.'<sup>3</sup> In Plowden we read: 'The sages of the law have qualified the rigour of the word according to reason', and 'have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion'. The equity which they here employ 'enlarges or diminishes the letter according to its discretion', and 'seems to be a necessary ingredient in the exposition of all laws'.<sup>4</sup> These are not merely the devout generalities of a bygone age under the influence of Renaissance theories of natural law. Between two

<sup>1</sup> Korkunov, *Theory of Law*, 476.

<sup>2</sup> Lect. XXXVII.

<sup>3</sup> Maxwell, *op. cit.* 339.

<sup>4</sup> *Stradling v. Morgan* (1560), Plow. 199, 205; *Eyston v. Studd* (1574), Plow. 465 f.



antagonistic principles—the authority of the printed word and the dictates of legal reasonableness—it is necessary, and often difficult, to preserve a nice balance. If the printed word irresistibly leads to an anomaly, then the Judges must regretfully allow it to do so: the responsibility is not theirs. But if reason and convenience can do it, this result will always be avoided. It is always to reason and convenience that the Court leans, and to that extent the reason of the Common Law consistently ‘controls’ the rigour of statute.

The  
policy of  
a statute.

A dilemma of the same kind confronts the Courts in dealing with what Austin calls the end or purpose *with which* the legislator acts; for this also cannot be ignored. It is repeatedly affirmed that it is not open to the Courts to regard a statute in the light of its social or parliamentary history. In the Middle Ages Judges, as members of the King’s Council, were themselves legislators and not infrequently interpreted an enactment according to their personal knowledge of its occasion and purport.<sup>1</sup> But a modern Judge would hesitate to say: ‘I was in Parliament when this Act passed, and I remember that in Committee such-and-such an amendment was proposed.’ These matters are extrinsic and inadmissible. Nor is it proper to determine the scope of statute by considering the general *social* policy of legislation. ‘I am bound to say’, said Lord Sterndale M.R.,

‘I think that it is an extraordinarily dangerous and mischievous doctrine to hold that a Court, in considering whether it can give effect to an Act of Parliament or not, is to examine the Act and see whether it considers it is the kind of legislation which is consistent with the general policy of the realm. Such an attitude . . . is one which might lead to extraordinary results. In my opinion all this Court can do is to say: Is that what is enacted by the statute? and, if it is, it must give effect to it.’<sup>2</sup>

On the other hand, it is common to find Judges referring to the ‘policy’ of a statute, and the reason

<sup>1</sup> Plucknett, *op. cit.* 49 ff.

<sup>2</sup> *Scranton’s Trustee v. Pearce*, [1922] 2 Ch. 87, 123.

for which it was passed. No Judge, for example, would hesitate to say that the various Bills of Sale Acts have been enacted to prevent the secret and fraudulent conveyance of property; or to keep that main purpose clearly in view in interpreting the provisions of the codifying Act. 'Although', says Jessel M.R.,

'the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended.'<sup>1</sup>

The leading principles here are summarized in the celebrated resolutions in *Heydon's Case* (1584), 3 Rep. 7a:

'It was resolved by the Barons of the Exchequer that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discussed and considered: 1st, What was the Common Law before the making of the Act; 2nd, What was the mischief and defect for which the Common Law did not provide; 3rd, What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and 4th, The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.'

These propositions, though they have a slightly pedantic flavour, are still constantly recognized by the Courts as rules of practical importance;<sup>2</sup> and their

<sup>1</sup> *Holme v. Guy* (1877), 5 Ch.D. 901, 905. As to the limitations on this principle, especially in regard to codifying statutes, see observations of Lord Herschell in *Bank of England v. Vagliano*, [1891] A.C. 107, 144 ff.

<sup>2</sup> See *In re Mayfair Property Co.*, [1898] 2 Ch. 28, 35.

consideration will often be decisive in interpreting the effect of a statute. Suppose, for example, that an enactment is in the following terms: 'The owner of every vessel . . . shall be answerable to the undertakers (i. e. managers of harbours, docks, &c.) for any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith, &c.'<sup>1</sup> The defendant is owner of the ship N. Under stress of weather the ship is endeavouring to enter the plaintiff's dock. It runs aground and has to be abandoned. The rising tide carries it against the plaintiff's pier and serious damage is done. Is the owner of the ship liable for this damage? The Court of Appeal says that an exception, recognized at Common Law, must be read into the Act, that if the damage is caused not by any preventible negligence or breach of duty, but by the Act of God, the owner shall be excused. The House of Lords says that this is to read more into the Act than is warranted. 'If an Act of Parliament', says the Lord Chancellor (Lord Cairns), 'declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God.' Two views, then, are possible: (1) The words of the Act must be construed strictly as they stand; the act of God is not a defence; the damage has in fact happened; the owner is liable. Only one learned lord (Lord Gordon) held this opinion. (2) The Act must be considered as 'suppressing the mischief and advancing the remedy'. Now the mischief which existed before this Act passed was that when damage was done by a vessel to a dock, pier, &c., it was often difficult to fix the responsibility on any particular person. It might be the navigator, or the charterer, or

<sup>1</sup> Harbours, Docks, and Piers Act, 1847.

the owner, and so forth; and the plaintiff might be put to the vexation and expense of much litigation before he could sheet the blame home to the person legally liable. The remedy intended by the statute was that in all such cases a definite person, viz. the owner, should be liable (though other specified persons might be liable as well). But the Act is one 'which collects together the common and ordinary clauses that it was the habit of Parliament to insert in the private Bills authorizing the construction of piers and docks'. Comparing it with the antecedent legislation, the Court deduces a general intention to fix the liability on an ascertainable person, but not to create a new kind of liability which was never contemplated in the analogous private Acts. Solely, therefore, by this examination of 'mischief' and 'remedy' and their legislative history, the House of Lords reaches the conclusion that the owner of the vessel was not intended to be, and is not, liable in the special circumstances of this case.<sup>1</sup>

It is one thing, however, to gather the intention of a statute from a consistent course of legislation, and quite another to apply it to circumstances concerning which an Act is silent. There was never any statute so far-sighted that it did not have its *casus omissi*; and there are a great many statutes in which the *casus omissi* seem to exceed the cases expressly provided for. The Courts cannot escape the responsibility of dealing with these unforeseen contingencies, and so far as possible they must deal with them according to the general spirit of the statute. Two kinds of *casus omissi* may be distinguished. (1) Sometimes a case arises, or a right is claimed, which is not dealt with by the statute either directly or indirectly. It has not been unknown in former times that Judges have extended the provisions of statutes in such a way as virtually to add a clause to them;<sup>2</sup> but in modern times Courts are bound to take

Casus  
omissi.

<sup>1</sup> *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743.

<sup>2</sup> A remarkable instance of judicial legislation is the construction

the view that if a case is entirely unprovided for by a statute, either directly or indirectly, unprovided for it must remain. Very inconvenient results may sometimes follow, but that is not the fault of the Judges. There have been some curious examples of draftsmen's oversights of this kind in the nineteenth-century legislation affecting Married Women. Thus the Act of 1870 (33 & 34 Vict. c. 93) made a married woman's separate earnings 'property held and settled to her separate use, independent of any husband'; and s. 11 of the same Act gave her power to maintain an action in her own name in respect of her separate property; but it was nowhere expressly stated that she might *be sued* in respect thereof, and it was consequently held that her husband must be joined with her as defendant in any action against her *quoad* separate earnings.<sup>1</sup> The Act of 1882 gave a married woman power to dispose as a feme sole of real estate being separate property of which she was legal owner, but did not expressly enable her to alienate lands of which she was an active trustee; and for this latter kind of disposition she therefore had

placed by Bereford C.J. on the statute *De Donis in Belyng v. Anon.*, Y. B. 5 Ed. II (S. S. xi), 176. As is well known, before the passing of the statute, where land was given to a man and the heirs of his body, the donee was free to alienate the land as soon as an heir was born. Now the operative words of the statute seem to provide no more than this, that in future *the original feoffee* (and only he) shall be restrained from alienating the land on the birth of issue. This Bereford held to be the literal provision of the statute; but he went on: 'He that made the statute meant to bind *the issue in fee tail* as well as the feoffees until the tail had reached the fourth degree; and it was only through negligence that he omitted to insert express words in the Statute to that effect.' It may very well be, as Mr. Bolland suggests, that this decision, rather than the statute itself, made the fee tail inalienable by both feoffee and issue in tail, until the device of fine and recovery was invented: see Y. B. 5 Ed. II (S. S. xi), Introd. xxv ff. Professor Holdsworth suggests that Bereford's interpretation was based on a not unnatural, but decidedly audacious, analogy to descent to issue in frank-marriage: *H. E. L.* iii. 115.

<sup>1</sup> *Hancocks v. Lablache* (1878), 3 C.P.D. 197.

to obtain the concurrence of her husband.<sup>1</sup> This inconsequence, surely never intended by the framers of the Act of 1882, was not remedied until 1907.<sup>2</sup> The same Act shows an hiatus, or at the least an ambiguity, to which public attention has lately been directed with considerable force. Inasmuch as the statute merely said that a husband *need* not be joined in an action of tort against the wife, the House of Lords has rejected the interpretation that the husband *shall* not be joined;<sup>3</sup> with the result, universally admitted to be illogical and inconvenient, that the husband is not liable for his wife's independent contracts but is liable for her independent torts. In these and many similar cases a strict construction refuses to attribute to the legislature an intention which is not suggested by the words of the statute. (2) It is often a very impalpable line which distinguishes these cases from others in which the legislature has given a general indication but has not explicitly included the particular case which arises for decision. Suppose, for example, that the Statute of Frauds had said that certain contracts must be evidenced by 'a document' containing certain particulars; it is to be doubted whether the Courts could ever have held that two or more 'documents' could be connected together as evidence within the statute. It specifies, however, 'a memorandum in writing'; and there is no reason on the face of it why a memorandum should not be contained in several documents related to each other *ex facie*. Again, the statute refers to a contract 'not to be performed within one year from the making thereof'. To be performed by whom? By one party or by both? When the case arises in which the contract cannot be wholly performed by one party within the year, but *may* be so performed by the other party, the Court cannot simply refuse to 'read something into

<sup>1</sup> *Re Harkness & Allsopp's Contract*, [1896] 2 Ch. 358.

<sup>2</sup> Married Women's Property Act, 1907.

<sup>3</sup> *Edwards v. Porter*, [1925] A.C. 1.

the statute': it is bound to decide how the general policy of the Act applies to this case, and in order to do so, it has to look for what is called 'the implied will of the legislator'.

Now when a Court declares, 'The legislator did not say this, but he would have said it if he had thought about it', it is clearly resorting to what is, to all intents and purposes, a fiction. The utmost uncertainty often prevails, not only as to what the intention of the law-giver was, but as to what it would have been in particular circumstances. Who can say whether, in the example just cited, Parliament would have said that a contract which *might* be performed by one party within a year ought or ought not to come within s. 4 of the Statute of Frauds? There is no more self-evident reason for one view than for the other; and the Courts admit candidly that the case-law on the point is quite arbitrary.<sup>1</sup> It is obvious, from reading the leading case,<sup>2</sup> that some distinguished Judges consider that the legislature in 1882 *did* intend a husband to be liable for his wife's torts, others that it did not. In innumerable instances the fate of the *casus omissus* lies entirely in the hands of the Judges, and in no real sense depends on the will of the legislator. The Courts lay down a rule exactly because the legislature has not done so, and has not intended to do so. Judges must and do carry out the express will of the legislature as faithfully as they can; but there is a very wide margin in almost every statute where the Courts cannot be said to be following any will except their own. The statute then becomes, as to a great part of it, not a direct 'command', but simply part of the social and legal material which Judges have to handle according to their customary process of judicial logic.<sup>3</sup>

<sup>1</sup> See, e. g., Lord Alverstone in *Hanau v. Ehrlich*, [1912] A.C. 39, 41.

<sup>2</sup> *Edwards v. Porter*, *ubi sup.*

<sup>3</sup> See Gény, *Méthode d'Interprétation*, i. 304 ff.

✓

Nothing therefore could be further from the truth than the notion that Parliament has only to express its will in appropriate words, and all legal and social consequences follow as the night the day. It is going too far to say that 'it is with the meaning declared by the Courts, and with no other meaning, that statutes are imposed on the community as Law';<sup>1</sup> for there are many parts of many statutes which have never been the subject of judicial interpretation at all, yet they are unquestionably the law of the land. But a very great, and the most important, part of the operation of statute is indissolubly dependent on the function of the Judge. To ignore this intermediate stage between the 'will' of the sovereign and the 'obedience' of the subject is to falsify completely the actual operation of statutory law in society. It is the unfortunate but inevitable consequence of this fact that interpretation sometimes results in the opposite of what the legislature seems to have intended. For this anomaly the deficiencies of human language and foresight are responsible. In these days of energetic and multifarious legislation it is difficult for any lawyer to resist the conviction that the less left to the mercy of this defective language and foresight the better for the peace of society. Better the principle *in nubibus*—for at least it may tempt men to fly and to explore—than the principle imprisoned within the four corners of a draftsman's vocabulary. Every day and all day our Judges are reminded that 'the letter killeth'. Lawyers are sometimes scolded for their sulky attitude towards the considered works of the illimitable legislative sovereign; but in this matter they—English lawyers at least—are not misled by their instinct. The Common Law is living and human. 'Statutes', says a witty writer on the lighter side of the law, 'have neither humanity nor humour. They are in language, grammar and common-sense real *biblia a-biblia*, unreadable and unread. Even in courts of law no one ever reads a statute.

General  
estimate  
of statute  
and its  
interpre-  
tation.

<sup>1</sup> J. C. Gray, *op. cit.* 170.



They are only quoted. Their disastrous effect on human happiness has made them rightly repellent to men of generous minds. Even judges . . . can scarcely hide their contempt for statutes that enact the opposite of what their author intended and only serve to entangle the simple and innocent in a net of ruin.'<sup>1</sup>

Due allowance made for the exaggeration of the satirist, these words do not inaccurately represent the feeling of the average English lawyer for statute-law. The law draws its waters from the natural springs of society itself, not from the artificial reservoir of Parliament. Some of our elaborate rules for the judicial interpretation of statute 'cannot', says Sir Frederick Pollock,<sup>2</sup>

'well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds. Our modern law of real property is simply founded on judicial evasions of Acts of Parliament, which, however, was of such a flagrant kind as could not take place nowadays. This kind of jealousy is by no means wholly extinct; we do not even say that under existing conditions it may not still be sometimes useful.'

✓ We live, however, in an age of legislation even more active than the nineteenth century, and it is useless to ask Parliament to restrict its energies. Existing social conditions and tendencies make this impossible. Nor is it desirable or practicable to dispense with the ultimate amending, regulating, and codifying power of the legislature. The Common Law developed by precedent is not, as we have seen, so perfect that it can do without a corrective supervision. But it is no impious wish on the part of any lawyer that if Parliament has to intervene in the development of the law, it should intervene as little as possible. The safeguard is, as has been said before, that up to the present the Courts have done the bulk of the work in developing the fundamental principles of jurisprudence which lie

<sup>1</sup> Judge E. A. Parry, *The Drama of the Law*, 62.

<sup>2</sup> *Essays in Jurisprudence and Ethics*, 85.

at the bottom of all legal systems, whereas the legislature has been more concerned with rules affecting social arrangements and the system of government. There is, however, a marked tendency at present for governmental and administrative legislation to monopolize the field of law and to embarrass the normal activities of the Courts in adjusting the essential rules of legal right and duty. This tendency is due to a gradual change in constitutional theory and legislative methods, which we must consider in the next chapter.

## VII

### SUBORDINATE AND AUTONOMIC LEGISLATION

#### I. GROWTH OF THE PRINCIPLE OF DEVOLUTION

THE legislation which we have been considering so far is the only kind known to the strict theory of our constitution—that of sovereign Parliament. According to that theory, all government, properly so called, must proceed from the supreme representative body of the realm. To the school of English analytical jurisprudence this is the typical, indeed the only, direct exercise of sovereign power.

Throughout Europe, however, the theory and practice of legislative processes has been visibly changing for more than a century. There has been a widespread development of the principle known as *devolution*. Its growth is not yet complete; it has not yet been entirely reconciled with established doctrines of government and of social organization. Indeed, it is impossible at present to foresee exactly what constitutional forms will ultimately emerge from it. The process has been forced on European peoples by the ever-growing complexity of social structure, which is the result of many factors beyond the scope of our present discussion, but chiefly, as I believe, of the simple fact of increasing populations. I cannot here survey, even if I were qualified to do so, the whole field of this movement, but must concentrate upon its manifestations in England—with the *caveat*, however, that England is by no means peculiar in this respect.<sup>1</sup>

<sup>1</sup> Here, as in so many legal institutions, European nations have been greatly influenced by mutual imitation, conscious and unconscious. The growth of the study of comparative law is helping to a better understanding of these international influences. On the purely adminis-

Nothing is more striking in the legal and social history of the nineteenth century than the development of local government. Though its roots strike into early institutions, the rate of its extension during the last century could never have been guessed by our forefathers.<sup>1</sup> It is now, beyond all doubt, an extremely large and important part of our social scheme and is bound to affect public and private law in every department. Every day it puts forth new shoots, and even within the memory of the present generation it has grown almost out of recognition—owing not only to the extraordinary conditions of war and the *sequelae* of war, but to an inherent vitality in the thing itself. If we look at a standard work like Sir Courtenay Ilbert's *Legislative Methods and Forms*,<sup>2</sup> written only twenty-five years ago, we shall be struck by the comparatively small and unimportant place which the author assigns to subordinate legislation. If we refer to another standard work on *Local Government in England* (Redlich and Hirst), also written within the present generation (1903), we find the following general conclusions as to the subordination of Departments to parliamentary control :

Traditional doctrine of delegated powers.

‘As the Ministry for the time being is only a Committee of a sovereign House of Commons, so the ministers and ministerial departments concerned with internal administration cannot follow their own impulses or conduct business as if they were bodies parallel to and independent of Parliament; they are, on the contrary, rather subsidiary aids to Parliament in the work of superintending government. They are merely intermediaries between Parliament and the Local Authorities, and cannot impose their own will on the latter.’<sup>3</sup>

trative side of devolution, a comparison of the chief developments in England, France, and Germany is to be found in Goodnow, *Comparative Administrative Law*.

<sup>1</sup> For the history of English Local Government see Redlich and Hirst, *Local Government in England*, i, Bk. I; Webb, *English Local Government*, especially iv, chaps. v and vi; Goodnow, *op. cit.* i, Bk. III, ch. v.

<sup>2</sup> Ch. iii.

<sup>3</sup> ii. 357.

And again :

' In the earlier pages of this work it has been explained how the new central departments, created in the nineteenth century, have been fitted into parliamentary Government and brought under the sovereignty of Parliament. The task of the Legislature has been to extend and intensify the work of internal Government without reviving the ghost of the Star Chamber, to preserve the rule of law without stinting or starving administration. This task has been successfully accomplished. In spite of a vast expansion of governmental activity, England at the beginning of the twentieth century has no administrative law and no administrative courts in the continental sense. Every act of public authority, no matter by whom, or against whom it is directed, is liable to be called in question before an ordinary tribunal, and there is no other means by which its legality can be questioned or established. And if the decision is unfavourable to the act in question, the proceeding complained of is immediately invalidated and nullified. There is no exception in England to the rule that every public proceeding, be it the issue of a warrant to arrest or a demand for rates, or a summons to pay money due to a public authority, or an order of Justices, is just as much a matter of ordinary law, and is liable to be questioned in the same way, as a private suit or action brought by one individual against another.'

A foot-note adds :

' Some trifling relics of a *droit administratif* are still to be found, as in the Petition of Right . . . and in a few restrictions upon actions against constables and public authorities. More modern tendencies towards a continental system of administration appear in certain powers granted to the Local Government Board, and described in a previous chapter, of adjudicating and finally deciding certain disputes arising out of modern laws of administration. After all that has been said in Part VI on the "quasi-judicial functions" of the Local Government Board it is enough here to repeat that they do not really encroach upon the unity and sovereignty of the law.'<sup>1</sup>

No longer  
accurate.

These confident assertions, which will also be

<sup>1</sup> ii. 364 f. *Scil.* the Local Government Board is now no more, its powers having been transferred, *mutatis mutandis*, to the Ministry of Health.

familiar to all readers of Dicey's *Law of the Constitution*, can no longer be said to represent truly the system of government and judicature in England. Indeed, in some respects they express the exact reverse of the truth. Even in 1903 they were far from accurate. I would ask the reader to contrast with them some significant observations made in 1886 by a scholar who combined an incomparable learning with a quality of genius which can be described only as a prophetic vision. Lecturing at Cambridge thirty-eight years ago, Maitland made a forecast so striking that I make no apology for quoting it at some length :

Maitland's  
warning.

'The traditional lawyer's view of the constitution has become very untrue to fact and to law. By the traditional lawyer's view I mean that which was expressed by Blackstone in the middle of the eighteenth century, and which still maintains a certain orthodoxy. According to that view, while the legislative power is vested in King and Parliament, what is called the executive power is vested in the King alone, and consists of the royal prerogative. Now most people know that this is not altogether true to fact—they know that the powers attributed to the King are really exercised by the King's ministers, and that the King is expected to have ministers who command the confidence of the House of Commons. Still I think that they would say that this was a matter not of law, but of convention, or of constitutional morality—that *legally* the executive power is in the King, though constitutionally it must be exercised by ministers. But the point that I wish to make is that this old doctrine is not even true to law. To a very large extent indeed England is now ruled by means of statutory powers which are not in any sense, not even as strict matters of law, the powers of the King.<sup>1</sup> . . . The new wants of a new age have been met in a new manner—by giving statutory powers of all kinds, sometimes to the Queen in Council, sometimes to the Treasury, sometimes to a Secretary of State, sometimes to this Board, sometimes to the other. But of this vast change our institutional writers have hardly yet taken any account. They go on writing as though England were governed by the royal prerogatives, as if ministers had nothing else to do than to advise the

<sup>1</sup> *Constitutional History of England*, 415.

King as to how his prerogatives should be exercised. In my view . . . we can no longer say that the executive power is vested in the King: the King has powers, this minister has powers, and that minister has powers. The requisite harmony is secured by the extra-legal organization of cabinet and ministry. The powers legally given to the King are certainly the most important, but I cannot consent to call them supreme.<sup>1</sup> . . . It seems to me impossible so to define constitutional law that it shall not include the constitution of every organ of government whether it be central or local, whether it be sovereign or subordinate. It must deal not only with the King, the Parliament, the privy council, but also with the Justices of the peace, the guardians of the poor, the Boards of Health, the School Boards, and again with the constitution of the Treasury, of the Education Department, of the Courts of Law. Naturally it is with the more exalted parts of the subject that we are chiefly concerned; they are the more intelligible and the more elementary: but we must not take a part for the whole or suppose that matters are unimportant because we have not yet had time to explore them thoroughly. Year by year the subordinate Government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832: it has gone far already and assuredly it will go farther. We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.<sup>2</sup>

## II. CHIEF SPHERES OF DELEGATED LEGISLATION

If this was true in 1888, it is infinitely more true to-day. The subject has now grown beyond the scope of satisfactory summary treatment; we can only glance briefly at some of the outstanding features of the present situation.

### *1. Powers directly delegated by Parlia- ment.*

As has been noted,<sup>3</sup> the great bulk of parliamentary legislation nowadays is of the social and administrative rather than of the 'legal' kind. Parliament is obliged

<sup>1</sup> *Constitutional History of England*, 417.

<sup>2</sup> *Ibid.*, 501.

<sup>3</sup> *Ante*, p. 176.

to delegate much of its legislative office, for two principal reasons: (1) it has not time to deal in detail with the multifarious matters which claim its attention; (2) many of these matters are so technical that they cannot conveniently be handled by anybody but experts, while many others are of exclusively local importance. Further, much of the time and interest of any government in power is taken up with purely political exigencies which have little to do with the prosaic business of supplying the needs of the community.

The result has been the rise of a number of organs of government which, though still subject to a general control of Parliament and of the Courts, are rapidly acquiring a power nearly co-ordinate with that of the 'supreme' law-making and law-administering bodies. Let us consider a few of these new elements in our Constitution.

The average citizen, it is to be supposed, thinks of the Privy Council only as a decorative and somewhat anachronistic body of little real moment in modern society. He would certainly never reckon it among the powers which govern him. Yet the field covered by Privy Council orders and regulations is immense; to set them out in detail would require many pages of print, if not a whole volume. They range from the minutest details of administration, e.g. the lighting and ventilation of cowsheds,<sup>1</sup> to legislation for dependencies, which latter has been attempted to be extended, though with doubtful legality, to the Channel Islands.<sup>2</sup> Orders of the Privy Council are of two kinds. They may take the form of an original exercise of the prerogative, independent of the law-making power of Parliament. To this class, for example, belong legislative Orders for the Crown Colonies, or regulations for trade and

(a) The  
Privy  
Council.

<sup>1</sup> Contagious Diseases (Animals) Act, 1878, s. 34.

<sup>2</sup> *Re the States of Jersey* (1853), 9 Moo. P.C. 185; Anson, *Law and Custom of Constitution*, ii, Pt. II, 55; Halsbury, *L. of E.* vi, § 582, and note.



commerce in time of war. During the Great War their number was immense and their effect far-reaching. Perhaps the best known was the celebrated Reprisals Order of 16th February 1917, which virtually imposed the economic blockade on Germany, inasmuch as it authorized the capture of vessels bound for neutral ports which afforded access to enemy territory. What is the legal force of Orders of this kind? The judgment of the Judicial Committee of the Privy Council in *The Zamora*, [1916] 2 A.C. 77, made it clear that an Order in Council, like every other act of the prerogative, is *sub lege*; it is subject to review by the Courts, and cannot, of its own mere motion, override the ordinary law of the land. But with this reservation the Courts must give the utmost weight to it. Orders of this nature—again like every act of the prerogative—are in effect acts of the Cabinet; they may be concerned either with questions of the general policy of the realm, or of policy affecting only one particular Department of State.

A second, much larger, and constantly growing class of Orders in Council consists of those which are issued in accordance with powers expressly delegated to the Council by Acts of Parliament. The statute defines the strategy and leaves to the Council the management of tactics. This would seem to place a large power in the hands of a body little suited for the arrangement of details; in reality, it is a constitutional disguise for *legislation by the executive*, to which we shall have to refer again. The Council which nominally emits these Orders is as ill fitted as any body could very well be to lay down minute rules for the ventilation of cowsheds and like matters. It consists of the Sovereign in person and a few Privy Councillors summoned by the Lord President, usually not less than six, and generally including one or two Cabinet Ministers. It meets at

<sup>1</sup> See also *The Canton*, [1917] A.C. 102; *The Oscar II*, [1920] A.C. 748.

irregular times and places, its composition is variable, no member has an enforceable right to be summoned to it, and the only constitutional convention—it is not more than that—which appears to govern it is that at least three Lords of the Council, and the Clerk of the Council, shall be present, besides the Sovereign.<sup>1</sup> Its procedure is in the highest degree formal, yet in the course of any year it issues many hundreds of Orders affecting a multiplicity of interests. All this means, as the reader will realize at a glance, that the Council merely lends formal sanction to legislation by Government Departments. It is they who are the true delegates of the legislature; the actual framing of the Orders is in their hands, and the sanction given by the Council is no more a real sanction than is the royal assent to bills passed by the Houses of Parliament.<sup>2</sup> We must return to this question of what must be called, despite the oxymoron, executive legislation, and we shall see that it multiplies so fast and affects so many relationships of civic life that the task of keeping it under control becomes progressively difficult.

Of more recent growth than the Privy Council are those 'rule-making' bodies which are now fairly numerous, and which possess important powers of many different kinds. The most conspicuous example is the Rules Committee of the Supreme Court, first set up in 1875, and now possessing an almost complete control over matters of procedure in all Courts.<sup>3</sup> Let nobody suppose that this is a matter of merely professional import. It is true that we have progressed beyond the days when men could, by an artificial game of pleadings, reduce the law to the paradox *ubi remedium*

(b) Rule-making  
Authorities.

<sup>1</sup> Maitland, *op. cit.* 406.

<sup>2</sup> See per Lord Shaw, *R. v. Halliday*, [1917] A.C. 260, 287.

<sup>3</sup> Judicature Act, 1875, s. 17; Appellate Jurisdiction Act, 1876, s. 17; Judicature Act, 1881, s. 19; Rules Publication Act, 1893; Judicature (Consolidation) Act, 1925, s. 99.

*ibi ius* ; but procedural law is still, and must always be, an indispensable adjunct to substantive law, and even to-day a good cause may easily be thrown away by ignorance of procedural forms. Consequently every practising lawyer has to know this body of adjective law as well as, if not better than, the juristic principles of substantive law. Here, then, is an example of pure Court-made law, or what the Germans call *Gerichtsgebrauch*. In its origin customary, this kind of law in modern conditions becomes subject to revision and formulation by specially constituted expert authority, such as the Rules Committee which we are considering. And this form of professional autonomy, ancient as it is, shows no signs of diminishing in present circumstances. It is noteworthy, on the contrary, that the example of the Rules Committee has been very widely imitated throughout the British Empire, until 'with the exception of some half a dozen scattered colonies, procedure is no longer regulated by statute anywhere in the Empire, but is subject altogether to Rules of Court alterable by the local judges with the approval of the local executive'.<sup>1</sup> In England, this power is not confined to the Rules Committee, a fairly large and representative body ;<sup>2</sup> in comparatively new jurisdictions it may be entrusted to a more centralized authority. Thus, under the Matrimonial Causes Act, 1857, ss. 53 and 67, and the Judicature Act, 1875,

<sup>1</sup> S. Rosenbaum, 'Rule-Making in the Courts of the Empire', *J. S. C. L. (N.S.)*, xv. 128 ff.

<sup>2</sup> The Lord Chancellor, together with any four or more of the following persons : the Lord Chief Justice, the Master of the Rolls, the President of the Divorce, Probate, and Admiralty Division, and four other judges of the Supreme Court, two practising barristers being members of the General Council of the Bar, two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society ; the four other Judges and the barristers and solicitors to be appointed from time to time by the Lord Chancellor : Judicature (Consolidation) Act, 1925, s. 99 (4). S. 99 also specifies the matters and purposes for which the rules can be made.

s. 18, the President of the Probate, Divorce, and Admiralty Division has power to make rules for the procedure of his Court. The power has been freely exercised in a jurisdiction where rules of practice are somewhat technical; for example, in November 1923 there were published, under the sole authority of the President, no less than ninety-eight Provisional Rules and Regulations affecting every branch of procedure in this division of the High Court, and superseding all previous rules.<sup>1</sup> A most important development in this branch of the law affecting the rights of a large section of the community in matrimonial affairs—indeed, more widely considered, affecting the whole institution of the family in England—is represented by the Poor Persons Rules.<sup>2</sup> Of no less moment than the Rules of the Supreme Court are the County Court Rules as to procedure and costs; these are drawn up by a Committee of five Judges appointed by the Lord Chancellor. Unlike the Rules of the Supreme Court, they are not subject to revision by Parliament, but are confirmed and put into force by the Lord Chancellor, with the concurrence of the Rules Committee of the Supreme Court.<sup>3</sup>

In no true sense can these rules of procedure be described as the work of Parliament. ( They are essentially rules created by the profession for the profession, for the better working of litigation.) They are, however, subject to rules of publicity and revision which will be noted presently.

Turning to local government, I should be going far beyond the scope of this chapter in attempting, even in barest outline, to describe the present range and variety of this form of devolution. I must content myself with one example. By a series of enactments,

(c) Local  
Authori-  
ties.

<sup>1</sup> Converted into Statutory Rules, S.R. and O. 1924, No. 126.

<sup>2</sup> Consolidated, after numerous amendments, S.R. and O., 1925, No. 908.

<sup>3</sup> County Courts Act, 1888, s. 164.

notably the Public Health Act, 1875 (and subsequent amending statutes), the Municipal Corporations Act, 1882, and the Local Government Act, 1888, local authorities—county, borough, rural, and urban district councils—have powers to enact by-laws, binding upon the public generally, for public health and for 'good order and government'. Offences against these by-laws are punishable on conviction by summary process by fines usually not exceeding £5. The range of subjects dealt with is immense; to take the commonest, we may note building, advertisements, care of the sick (hospitals, vaccination, infectious diseases), cleanliness of dwelling-houses, housing of the working-classes, town-planning schemes, protection against fire, offensive trades, public libraries, museums, nuisances, scavenging and cleansing, police, rating, education, traffic, highways, burials, and the conduct generally of persons in public places.

All these matters, and their many analogues in local government, count for far more in the daily lives of ordinary citizens than the enactments of Parliament. The far-off dignity of the House of Commons, though to the instructed it may symbolize the majesty of the Constitution, to the plain law-abiding man is but a name compared with the immediate discipline of magistrates, policemen, and inspectors. It may be an eternal verity that Britons never shall be slaves; but British officials are invested with surprising powers to keep liberty within conventional limits. It is, for example, a favourite *cliché* that the right of property is 'unlimited'. The very essence of the idea of property, we are told, is that a man shall be able to 'do what he likes with his own'. Let any believer in this cherished doctrine put it in practice in the simple operation of building a house. He will find remarkably little scope for any original notions of architecture he may possess. Not a single part of his edifice but is provided for in advance, often in exact terms of feet and inches, by the

by-laws of the local authority. If he is disposed to fight for his original ideas, he will find the contest difficult and costly; and if he is wise, he will resign himself to allowing the local engineer or inspector to do the major part of the planning for him. This is not said altogether by way of criticism; it is very necessary for the common weal that in a crowded community some such restrictions should exist. \But it is certainly a much greater limitation on the abstract theory of property than is usually recognized.]

Delegation to the executive, or departmental legislation, has been already mentioned, and we have seen that it often operates through Orders in Council. But the delegation is frequently more direct than this: a Minister, Board, or Committee is empowered to fill in, as it were, the interstices of a principal statute which Parliament has neither time, capacity, nor inclination to fill in for itself. The extent to which this expedient has grown is one of the most remarkable features of our constitution at the present time. It has become almost the 'common form' of legislation. 'In mere bulk', writes Mr. C. T. Carr,<sup>1</sup> who, as editor of the Statutory Rules and Orders, speaks with peculiar authority on this subject, 'the child now dwarfs the parent. Last year (1920), while 82 Acts of Parliament were placed on the statute book, more than ten times as many Statutory Rules and Orders of a public character were officially registered under the Rules Publication Act. The annual volume of public general statutes for 1920 occupied less than 600 pages; the two volumes of the Statutory Rules and Orders for the same period occupy about five times as many. This excess in mere point of bulk of delegated legislation over direct legislation has been visible for nearly thirty years.' In the two volumes of statutes for 1925, 91 Public General Acts are placed upon the statute book. From these I will for the moment exclude seven enact-

(d) Executive or Departmental legislation.

<sup>1</sup> *Delegated Legislation*, 2.

ments concerned with the new law of property.<sup>1</sup> Out of the remaining 84 Acts, no less than 44 delegate powers of legislation to various authorities,<sup>2</sup> among which we may mention the following :

*Ministers.* Health, Agriculture and Fisheries, Transport, Labour, Pensions.

*The Privy Council* (frequently).<sup>3</sup>

*Departments.* Treasury, Admiralty, Education, Scottish Board of Health, Scottish Education Department.

*Commissioners.* Scottish Ecclesiastical, Land Purchase (Northern Ireland), Customs and Excise, Electricity, Joint Committee and Joint Advisory Committees,<sup>4</sup> Trustees of the National Library of Scotland, Lords Commissioners of Judiciary.

*Local authorities* (frequently).<sup>5</sup>

*Miscellaneous.* Lord Chancellor, Lord Chief Justice, Rules Committee of the Supreme Court, Senior Master of the Supreme Court,<sup>6</sup> Registrar-General.<sup>7</sup>

<sup>1</sup> Settled Land Act (ch. 18), Trustee Act (ch. 19), Law of Property Act (ch. 20), Land Registration Act (ch. 21), Land Charges Act (ch. 22), Administration of Estates Act (ch. 23), Universities and Colleges Estate Act (ch. 24).

<sup>2</sup> It seems hardly necessary to mention all the Acts by their titles, but it may be convenient to give the numbers of the chapters. They are : 3, 6, 10-12, 14-17, 28, 30, 33-8, 39, 41, 42, 44, 47, 49, 50, 52, 53, 55, 59, 60, 63, 68, 69-71, 73, 75, 81, 84-90.

<sup>3</sup> e.g. Borough Councillors (Alteration of Number) (ch. 11), Merchant Shipping (Equivalent Provisions) (ch. 37), Merchant Shipping (International Labour Conventions) (ch. 42), Judicature (Consolidation) (ch. 49), Dangerous Drugs (ch. 74).

<sup>4</sup> 'For securing uniformity of standards' in regard to certain therapeutic substances : Therapeutic Substances Act (ch. 60), s. 4.

<sup>5</sup> e.g. Fire Brigade Pensions (ch. 47), Advertisements Regulation (ch. 52), Mental Deficiency (Amendment) (ch. 53), Roads Improvement (ch. 68), Public Health (ch. 71), Public Health (Scotland) Amendment (ch. 75), Education (Scotland) (ch. 89).

<sup>6</sup> Administration of Justice (ch. 28), Judicature (Consolidation) (ch. 49).

<sup>7</sup> Widows', Orphans', and Old Age Contributory Pensions (ch. 70).

In not a few cases the legislative function is not merely confided to one authority, but is divided among a number.<sup>1</sup> The passage of the seven great Acts, mentioned above, relating to the new law of property, had already in March 1926<sup>2</sup> produced 26 whole codes of rules concerning bankruptcy, copyholds, filing of leases, land charges, lunacy, Middlesex deeds, probate direction, redemption of rents, renewable leaseholds, restrictive covenants, solicitors' fees, statutory forms, Funds Rules, trust corporations, and registered lands.<sup>3</sup> The constitutional relationship between all these Rules and Orders and the superior control of Parliament we shall consider presently.

Besides these distinct parts of our constitutional machinery, there are a large number of corporations, standing quite outside the governmental system, which are invested with the power of making by-laws for themselves and in many cases for the public at large. They are usually corporations of the so-called 'public utility' kind—companies for transport, light, heat, water, and in general all essential public services corresponding to the commonest daily needs of the community. Though these by-laws are as binding on those

2. *Autonomic powers.*

(a) Corporations, Churches, &c.

<sup>1</sup> e.g. Administration of Justice Act (ch. 28) (Lord Chancellor, Lord Chief Justice, Rules Committee, Senior Master of the Supreme Court); Judicature (Consolidation) Act (ch. 49) (Order in Council, Rules Committee, Lord Chancellor, President of the Probate, Divorce, and Admiralty Division); Widows', Orphans', and Old Age Contributory Pensions Act (ch. 70) (Minister of Health, Registrar-General, National Health Insurance Joint Committee, local authorities); and notably Rating and Valuation Act (ch. 90) (Minister of Health, Secretary of State, rating authorities, various local authorities, committees, and referees). <sup>2</sup> Others have since been published.

<sup>3</sup> Again it seems superfluous to give the names of all the rules in detail. They may be found in *The Law Journal* for 6th March 1926, p. 235, where it is observed with justice: 'The number of new Rules and Orders is such, and their titles are often so similar, that the task of the practitioner who, possibly at short notice, requires to turn to the latest regulations on a particular branch of the new law, is at the moment . . . a very difficult one. It is not that he is likely not to see the wood for the trees; it is that he is liable to get lost in the forest.'



whom they affect as Acts of Parliament themselves, they are, as we shall see, subject to a judicial scrutiny which is not applicable to statutes proper.] Of that kind of corporation law which is most strictly called *autonomic*, inasmuch as it affects directly only the members of the corporation, the most familiar example is the articles of association of a joint-stock company. Ecclesiastical bodies, again, have been conspicuous throughout history as autonomous societies-within-societies. The degree of autonomy has diminished in modern times, but it is still considerable. The Church of England, for example, though 'by law established'—i. e. by the general law of the land, and not by any peculiar authority or jurisdiction of ecclesiastical law—enjoys no small measure of self-government, now vested in the National Assembly by the so-called Enabling Act of 1919.<sup>1</sup> The Measures passed by this body affect the entirety of communicants, and in form and substance are statutes. Parliament controls them to the extent that they must be confirmed by a resolution of each House of Parliament, but with that reservation they are free to deal with 'any matter concerning the Church of England', *not excluding Acts of Parliament*. Thus in 1926 a Measure repealed eight whole Acts and twenty-one sections of other Acts.<sup>2</sup> Not dissimilar to the autonomy of the Church is that of certain Universities, especially Oxford and Cambridge and their colleges.

Effect of  
auto-  
nomic  
laws.

Although it is a settled principle that subordinate laws of this kind, unlike by-laws issued by, say, a railway company, are not directly binding on anybody outside the corporation which makes them,<sup>3</sup> that principle does not completely state their legislative effect. Negatively, they apply to everybody: that is to say, everybody is under a definite legal duty not to interfere

<sup>1</sup> Church of England Assembly (Powers) Act, 1919.

<sup>2</sup> First Fruits Measure, 1926.

<sup>3</sup> *London Assoc. of Shipowners, &c., v. London, &c., Joint Committee*, [1892] 3 Ch. 242, 255.

with the rights which they confer. A Roman Catholic claims no rights under the Enabling Act, nor does he owe any positive duties of an ecclesiastical kind to the Anglican community; but if he prevents a member of that community from exercising powers granted him by a Measure of the National Assembly, he commits a civil wrong just as much as if he prevented a qualified voter from exercising his Parliamentary franchise. The same is true of anybody who interferes with a shareholder in the exercise of powers conferred by the articles of association of a limited company, though the person interfering may have no rights or duties under the articles. All valid autonomic legislation, however restricted its positive scope, may be said to have this negative and by no means unimportant meaning for the whole body of citizens; and it therefore cannot be regarded as something altogether distinct and apart from the general rule of law.

In the foregoing examples autonomous rules originate in a specific antecedent legal sanction. The law does not formulate the articles of association of a joint-stock company, but it gives the company legal power to bind its members by articles which they agree upon among themselves. Neither does it formulate the Measures of the National Assembly, but it accords in advance binding force to such Measures, *if intra vires*, as the Assembly agrees to pass. There is another kind of autonomy, increasingly noticeable at the present time, which does not take its rise from any explicit statutory authorization, but grows up simply by the will and practice of a particular group existing for a particular purpose—or what German jurists call a *Zweckverband*. The most pronounced form of this species of autonomy in modern society is found in industrial organization; and this will serve as a good example to illustrate the difference between antecedently authorized autonomy, and—if I may be pardoned the tautology—purely autonomous autonomy.

(b) Syndical control of industry.

For many and obvious reasons, fellow-workers in the same craft naturally tend to combine in guilds and unions. Trade guilds are of ancient origin in England; but for a long time our law refused, on grounds of supposed public policy, to recognize the kind of organization which came to be known as the Trade Union. As everybody knows, the industrial conditions of the nineteenth century made this policy of the law progressively inappropriate, and by a movement culminating in the Trade Unions Act, 1871, Trade Unions came to be recognized as legitimate associations with power to make autonomic rules for themselves.<sup>1</sup> This kind of industrial autonomy may therefore be said now to rest upon express legal recognition. ~~But~~ at the present time we are witnessing a totally different kind of trade autonomy which rests upon no such sanction. It proceeds in this case not from labour but from capital, and indeed may be said in some sort to be capital's answer to the very powerful autonomy now exercised by Trade Unions. Employers, producers, and distributors are now very commonly organized in associations which regulate output, supply, and prices, and regulate them with extreme strictness. Not only merchants and consumers, but lawyers also, are frequently reminded of this fact by cases of 'combination', 'coercion', 'conspiracy', or 'intimidation'—our law has not yet found even a satisfactory name for this new situation—in which the point of conflict is always the same, viz. that an individual in a particular industry refuses to submit to association rules and in consequence is virtually prevented from exercising his calling, the other members having agreed in advance that they will ostracize any recalcitrant trader. Rules of this kind are often said to be 'voluntary', and are cited as examples of 'autonomy by consent'; but in reality the voluntary element is largely fictitious. No man, it is true, is legally compellable to submit to the

<sup>1</sup> See Slessor and Baker, *Trade Union Law*, Pt. I.

rules of a trade association, but the compulsion of bare existence is stronger than that of law. It does not completely meet the case to say that ultimately the Courts exercise a control over the arrangements of these voluntary associations, if they come into conflict with common right. We cannot disregard actual conditions as they affect ordinary social and industrial relationships. It is no satisfaction to a man who wishes to sell his goods at his own price, and who is prevented from doing so under pain of boycott and commercial annihilation, to know that Parliament has the power to declare price-maintenance associations illegal. Parliament does not in fact do so, and the trader must accept the conditions imposed upon him by an autonomous organization which he is powerless to resist. This feature of modern industry has, in recent years, presented the Courts with some of the most difficult problems they have had to face, and it cannot be said that a wholly illuminating jurisprudence has yet emerged from their decisions.<sup>1</sup> It is quite manifest that our law in this respect is still in a painful stage of transition, and probably the Gordian knot will eventually have to be cut by legislation.

What has been said, though it is far from exhaustive of this complex subject, will be enough to indicate the principal directions in which subordinate legislation

3. *Forms of subordinate legislation.*

<sup>1</sup> The cases are too numerous to mention in full, but the most important in the last few years are *Ware and de Freville v. Motor Trade Assoc.*, [1921] 2 K.B. 40, (an interesting and logical sequel to which is *R. v. Denyer*, [1926] 2 K.B. 258) and *Sorrell v. Smith*, [1925] A.C. 700. The latter decision, though the most authoritative, as proceeding from the highest tribunal, still leaves many points in doubt, owing to sharp differences of judicial opinion.

In the above remarks I have purposely omitted reference to the very powerful autonomic rules which govern professional associations such as the Bar and the medical profession, and which are partly controlled by statutory authority and are partly autonomic—e. g. the powers *de jure* of the General Medical Council on the one hand, and the powers *de facto* of the British Medical Association on the other. As to the latter, see *Pratt v. British Medical Assoc.*, [1919] 1 K.B. 244.

has grown and is still growing. It cannot be regarded as anything else than an integral part of the 'law of the land', if that term is to have any practical meaning. Since all men must at their peril know the law which governs them, or at least know how to obtain access to it, it is relevant to inquire into the forms in which this ever-expanding body of law is embodied. We have already seen that the 'statute-book' is not a book which he who runs may read. The sub-statute-book is an even more difficult, and a far more incomplete, text. It consists of the annual volumes of Statutory Rules and Orders, which contain in serial and reasonably accessible form, very similar to that of Parliamentary enactments, the principal rules and orders issued during a particular year by a bewildering variety of authorities. This series is the offspring of the Rules Publication Act, 1893, which (s. 3) provides that statutory rules shall be numbered, printed, and sold by the official printer of Acts of Parliament; but the rules there contemplated are only such as are made by a 'rule-making authority' as defined by the Act. This excludes a considerable amount of sub-legislation which is merely confirmatory, or executive rather than legislative, or of purely local application, or confidential; it also excludes rules and by-laws made by bodies which are not 'rule-making authorities' within the meaning of the Act—e. g. public utility corporations and local authorities.<sup>1</sup> Although, therefore, the publicity given

<sup>1</sup> See Carr, *op. cit.*, ch. v; and the Introduction to any annual volume of Statutory Rules and Orders. With regard to local legislation, it is not easy to find proper records of the regulations of municipal and similar bodies. It is true that 'due public notice' must be given of them so that rate-payers may have an opportunity of objecting to them, but it would be interesting to meet any rate-payer who has ever seen them, unless he had special occasion and went to special pains to do so. As to by-laws 'for good order and government', the present writer, after some pertinacious but not sanguine experiments, must confess that he does not know where or how they are to be seen, nor by what means a citizen is to be informed, until after the event, when

to our delegated legislation is far from complete, it may be said on the whole that the system introduced in 1893 makes the more important parts of Statutory Rules and Orders at least as accessible as the enactments of Parliament; and this is highly necessary, for a glance at any volume of Statutory Rules and Orders will show that many of these demi-enactments are in form and substance as comprehensive as major statutes themselves, and much more detailed.<sup>1</sup> Difficulty, however, is caused by revision, repeal, and amendment, and by the fact that many Orders are made not directly under statutes, but under previous Orders; in which case they become sub-sub-legislation, and strictly have no claim to a place in the printed volumes.<sup>2</sup> As an example of the complexity which may result from this process of sub-delegation, let me cite the preamble to one Order,<sup>3</sup> which reads thus:

‘Whereas by the Aliens Order, 1920,<sup>4</sup> hereinafter referred to as the principal Order, made in pursuance of the Aliens Restrictions Acts, 1914–19, His Majesty was pleased, by and with the advice of His Privy Council, to impose certain restrictions on aliens, and to make provision in accordance with the said Acts for giving effect to the said Order:

‘And whereas by the Expiring Laws Continuance Acts, 1920 and 1921, the Expiring Laws Act 1922, and the Expiring Laws Continuance Acts, 1923 and 1924, s. 1 of the Aliens Restriction (Amendment) Act, 1919, were continued until 31st December 1925:

‘And whereas His Majesty has power by Order in Council to revoke or add to any Order in Council made under the said Acts:

‘And whereas the principal Order was amended by Orders or why he is liable to a fine not exceeding £5. Only a homely morality, or a wholesome fear (according to the point of view), saves most of us from the consequences of this enforced ignorance.

<sup>1</sup> e. g. the Housing (England) Order (S.R. and O., 1925, No. 866), a long and important enactment covering 52 pages of close print.

<sup>2</sup> Carr, *loc. cit.*

<sup>3</sup> Restrictions on Aliens Order, S.R. and O., 1925, No. 760.

<sup>4</sup> S.R. and O., 1920, No. 448.

in Council dated 3rd December 1920<sup>1</sup> and 12th March 1923:<sup>2</sup>

‘And whereas it is expedient that provisions of the principal Order, as amended, should be further amended in the manner herein appearing :

‘And whereas the provisions of s. 1 of the Rules Publication Act have been complied with:

‘Now therefore His Majesty is pleased, &c.’

Even the draftsman of this Order must have had some difficulty in tracing its devious course to the fountain-head : anybody less expert might shrink from searching for its source as he would shrink from searching for the sources of the Nile.<sup>3</sup>

### III. RELATION BETWEEN SOVEREIGN AND SUBORDINATE LEGISLATION

Let us now ask what constitutional control is exercised over delegated legislation, considering first the theoretical powers possessed in this respect by legislative and judicial authorities, and second, the practical working of these checks which they seem to exhibit at the present time.

1. *Constitutional checks.*
- (a) *Publicity and Parliamentary control.*

First, then, as to Parliamentary control. The first requirement is adequate *publicity* of rules and regulations. This is provided for in general terms by s. 1 of the Rules Publication Act, 1893, which enacts that when any statute authorizes the making of subordinate rules, *and further directs that these rules be laid before Parliament*, at least 40 days' notice must be given in the *London Gazette* of intention to make the rules, and of the place where copies thereof may be obtained. The object of this provision is that any person (including corporations in that term) who is specially interested

<sup>1</sup> S.R. and O., 1920, No. 2262.

<sup>2</sup> S.R. and O., 1923, No. 326.

<sup>3</sup> On the extraordinary ramifications of this nature which developed from the Defence of the Realm Act, see Carr, *loc. cit.*, and S. W. Clarke, ‘The Rule of Dora’, *J. S. C. L.*, 3rd ser., i. 36.

in the rules may make representations to the Department or other authority concerned, which is bound to give them due consideration. In this way amendment and further deliberation are encouraged before the rules in their final form are laid before the House. It will be noticed that this procedure applies only when Parliament requires the rules to be submitted to it: this requirement is usual but not invariable; and further, a considerable number of rules, by no means unimportant, are specially excepted by s. 1 (4).<sup>1</sup> When the above-mentioned preliminary period has expired, a further check is commonly imposed in the form that Parliament may, on certain conditions, annul the Rule or Order.<sup>2</sup> These conditions vary according to the terms of the statute which defines them: sometimes the proposed rule must lie before the House for a specified number of days before it takes effect<sup>3</sup>—in which case, as has been seen, preliminary publication is not required; more often, the rule is made and comes into effect, but for a specified period is, so to speak, 'on approval', and may be revoked by various methods, most commonly an Address of both Houses, which

<sup>1</sup> 'The statutory rules to which this section applies are those made in pursuance of any Act of Parliament which directs the statutory rule to be laid before Parliament, but do not include any statutory rules if the same or a draft thereof are required to be laid before Parliament for any period before the rule comes into operation, nor do they include rules made by the Local Government Board for England or Ireland, the Board of Trade, or the Revenue Departments, or by or for the purposes of the Post Office; nor rules made by the Board of Agriculture under the Contagious Diseases (Animals) Act, 1878, and the Acts amending the same.'

<sup>2</sup> *Scil.*, it always has the power of amendment.

<sup>3</sup> e. g. Agriculture Act, 1920, s. 15 (1): 'A draft of any regulations made under this sub-section shall be laid before each House of Parliament for not less than 30 days during which the House is sitting, and, if either House before the expiration of that period presents an Address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of any new draft regulation.' Cf. Electricity (Supply) Act, 1919, s. 7 (2); Parks Regulation Act, 1872, s. 9; Prison Act, 1898, s. 2.



leads to formal annulment by Order in Council.<sup>1</sup> Sometimes, again, the operation of the Order is made conditional upon its periodical renewal at intervals even as short as seven days.<sup>2</sup> These checks are more formidable in theory than in practice; for it will readily be understood that Parliament has little time or taste for closely scrutinizing the huge mass of Rules and Orders which is constantly accumulating, and which for the most part relates to subjects devoid of charm or interest to the ordinary mind. The actual exercise of Parliamentary control is therefore rare, and it may be said to become daily rarer. On the other hand, it has sometimes been used to good effect, and the mere existence *in potentia* of Parliament's right of intervention is no inconsiderable safeguard against hasty or arbitrary sub-legislation. But it cannot be disguised that the more rapidly delegated legislation grows, the greater is the danger that Rules and Orders may escape the vigilance of the House, and that ratification by Parliament may become more and more mechanical.<sup>3</sup>

(b) Judicial  
control.

Parliamentary control is direct, by way either of amendment or of abrogation; the control of the Courts is indirect; being an exercise of judicial interpretation, it cannot actually annul subordinate enactments, but can only declare them inapplicable in particular circumstances. The effect is practically the same in the two cases: the Rule or Order frowned upon by the Courts, though not actually abrogated, becomes a dead letter,

<sup>1</sup> e. g. Housing, Town Planning, &c., Act, 1919, s. 7 (3). The period of suspended animation in such cases is often 21 days, but there is no uniform rule, and the periods seem to differ according to the practice of various Departments. For the effect of Orders in this form, see *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347.

<sup>2</sup> e. g. Emergency Powers Act, 1920, s. 2 (2). It goes without saying that if the formalities prescribed in the principal statute are not complied with, the rule purporting to be made thereunder is null and void: see *Metcalfe v. Cox*, [1895] A.C. 328.

<sup>3</sup> On the whole subject see Carr, *op. cit.*, ch. iv.

because in future no responsible authority would attempt to apply it, or, if it were applied, nobody need submit to it.

(Judicial control operates, first, through the doctrine of *ultra vires*, universally applicable to autonomic legislation.) As it is axiomatic that the enactments of Parliament can never be subject to judicial review, so it is axiomatic that all enactments made subordinatedly by virtue of specific statutory or Common Law authority are subject to the test whether they fall within the periphery of the power thus conferred. If they do not, they are utterly void and of none effect. Even though a rule or Order may have been made conditionally on ratification by Parliament, and may have received such ratification, it is still open to the Courts to inquire whether it falls within the scope of the enactment from which it purports to derive its authority. The high constitutional importance of this function of the Courts is well expressed by Lord Shaw :

Doctrine  
of *ultra*  
*vires*.

‘The author of the power is Parliament: the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra* or *intra vires*. . . . In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary government and therein of grave constitutional and public danger. The increasing crush of legislative efforts and the convenience to the Executive of a refuge to the device of Orders in Council would increase that danger tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny.’<sup>1</sup>

In short, this ‘independent scrutiny’ is one of the cardinal principles in a properly adjusted system of constitutional checks and balances. No general rule can be laid down for it. *Ex hypothesi* it is essentially a matter of interpretation turning upon particular considerations in each case. It is plain that much must depend on the terms, wide or narrow, in which the

<sup>1</sup> *R. v. Halliday*, [1917] A.C. 260, 287.

statutory power is expressed ; and it is eminently desirable, in order to avoid the arbitrary government which Lord Shaw deprecates, that these terms should take as precise and unambiguous a form as possible. Otherwise the Courts, if not actually powerless, find an excessive burden laid upon judicial discretion. The most remarkable example in the history of our delegated legislation of the incalculable results which may flow from loosely worded powers is the Hydra-headed monster which, between 1914 and 1918, grew out of the phrase 'defence of the realm'. It is too fresh in the memory of the public to need renewed description.<sup>1</sup> It 'took an unconscionable time dying', if its life can even now be pronounced quite extinct. The apology for it, it need hardly be said, was that if nothing less than a monster is adequate to guard the Hesperidean Garden, then a monster there must be. But it was not the least among the solaces of peace that this country, with its deep dislike of irresponsible Government, was able, before the dragon became unmanageable, to embalm it and stuff it and place it among the specimens in our richly varied constitutional museum. This sense of relief was doubtless shared by our Judges when, the danger past, they were at last able to assist in the process of benevolent examination.<sup>2</sup>

By-laws. All by-laws made by subordinate authorities are subject to a system of checks. By statute, some require the approval of different Government Departments ; thus by-laws made by railway companies must be approved by the Minister of Transport, and those made by local authorities for public health or 'good order and government' are subject to a supervision and alteration by the Minister of Health. Apart from this Ministerial scrutiny, by-laws have always been liable

<sup>1</sup> See Carr, *op. cit.* 29 ff. ; S. W. Clarke, 'The Rule of Dora', *J. S. C. L.*, 3rd Ser., i. 36 ; and the volumes of Emergency Legislation edited by Mr. Alexander Pulling during the war.

<sup>2</sup> See especially *Chester v. Bateson*, [1920] 1 K.B. 829.

to review by the Courts.<sup>1</sup> The judicial tests which they must satisfy are well established: <sup>2</sup> (1) They must be made, sanctioned, and published in the manner prescribed by the statute which authorizes them; (2) they must not be repugnant to the laws of England; <sup>3</sup> (3) they must not be repugnant to the statute under which they are made; (4) they must not be vague or uncertain in their terms; (5) they must not be unreasonable. It is a settled rule of construction that the Courts will interpret local by-laws benevolently, and will not be astute to invalidate them on purely technical grounds.<sup>4</sup> Of the tests above-named, that of unreasonableness gives the Courts the widest power of appraising the general expediency of a by-law; but the test is as variable and as difficult here as it is in all other branches of the law. In the leading case of *Kruse v. Johnson*, [1898] 2 Q.B. 91, it was held not unreasonable to give a policeman power to prevent street music of any kind within fifty yards of a dwelling-house, even without proof that the music was an annoyance to any person or persons. In *Da Prato v. Provost, &c., of Partick*, [1907] A.C. 153, it was held not unreasonable for a by-law to close all ice-cream shops at 10 p.m. On the other hand, the following provisions in by-laws have

<sup>1</sup> The rule is very old. There are numerous cases in the Year Books concerning the by-laws of guilds and corporations: see Bacon or Rolle, *Abr. sub. tit. By-law*. On the interpretation of by-laws generally see Craies, *Statute Law* (3rd ed.), 256 ff., and Maxwell, *op. cit.* 523 ff.

<sup>2</sup> Craies, *loc. cit.*

<sup>3</sup> 'All [by-laws] which are contrary or repugnant to the laws or statutes of the realm are void and of no effect': *Chamberlain of London's Case* (1591), 5 Co. Rep. 63 a.

<sup>4</sup> 'Their Lordships feel strong reluctance to question the reasonable character of by-laws made under such circumstances [i. e. under the existing checks] and doubt whether they ought to be set aside as unreasonable by a Court of Law, unless it be in some very extreme case': *Slattery v. Naylor* (1888), 13 App. Cas. 446, 543. Cf. *Kruse v. Johnson*, [1898] 2 Q.B. 91, 99; *Salt v. Scott Hall*, [1903] 2 K.B. 245, 248.

been held unreasonable: not to keep swine within fifty feet of any dwelling-house;<sup>1</sup> to compel a person in charge of a vehicle selling a small quantity of coal to re-weigh it at the request of the purchaser, or of anybody on behalf of the purchaser, or of an inspector of weights and measures, or of any constable;<sup>2</sup> to prohibit the sale in public places of newspapers, &c., devoted to tips and information about horse-races.<sup>3</sup> It sometimes happens that a by-law which has been accepted as valid for a considerable period will eventually be declared unreasonable, and the same objection which is made to the irregular operation of case-law<sup>4</sup> becomes equally applicable to the operation of subordinate enactments. Thus in *Repton School Governors v. Repton R.D.C.*, [1918] 2 K.B. 133, the Court pronounced against a building by-law which had been long accepted without demur—viz. that every new building (including in that term *any addition to an existing building*) should have an open space of not less than 150 feet at the back.<sup>5</sup> The cases are not all easy to reconcile, but it is clear that the Courts will uphold the regulations of local authorities as far as they can. It would appear that by-laws may be valid even when they interfere with, or take away, without compensation, existing rights of property;<sup>6</sup> and sometimes they are undoubtedly enforced in what seems to be a very high-handed manner.<sup>7</sup> It may be added that in modern statutes, at all events since the war, the tendency is to define by-law-making powers with as great particularity as possible.<sup>8</sup>

In addition to this general function of reviewing sub-

<sup>1</sup> *Heap v. Burnley Union* (1884), 12 Q.B.D. 617.

<sup>2</sup> *Alty v. Farrell*, [1896] 1 Q.B. 636.

<sup>3</sup> *Scott v. Pilliner*, [1904] 2 K.B. 855.

<sup>4</sup> *Ante*, p. 179.

<sup>5</sup> See also *A.-G. v. Denby*, [1925] Ch. 596.

<sup>6</sup> *Slattery v. Naylor* (1888), 13 App. Cas. 446; *A.-G. v. Hodgson*, [1922] 2 Ch. 429.

<sup>7</sup> See *L.C.C. v. Worley*, [1894] 2 Q.B. 826.

<sup>8</sup> e. g. Housing Act, 1925, s. 6.

ordinate legislation, the Courts possess certain direct powers over the acts and procedure of public authorities. The most important of these are the prerogative writs of the King's Bench. *Mandamus*<sup>1</sup> is, in the words of Bowen L.J.,<sup>2</sup> 'a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done.' Where, therefore, any public authority or official is under an *absolute* duty to perform a certain function, and, on demand duly made, refuses to perform it, any person who has a legitimate and sufficient interest in the performance of it may, provided there is no other remedy equally convenient, beneficial, and effectual<sup>3</sup> open to him (e. g. by way of appeal), apply to the High Court for a *mandamus* to compel the performance of the duty.<sup>4</sup> *Mandamus* is specially applicable to administrative acts; *certiorari*<sup>5</sup> provides a control over *judicial* acts<sup>6</sup> of subordinate jurisdictions. The basis of this writ has recently been stated in the following succinct terms: 'Wherever any body of persons having legal authority to determine

Mandamus.

Certiorari.

<sup>1</sup> See Short and Mellor, *Crown Practice*, ch. ii; G. E. Robinson, *Public Authorities and Legal Liability*, 222 ff.; Redlich and Hirst, *op. cit.* ii. 366.

<sup>2</sup> *Reg. v. Commissioners of Inland Revenue, In re Nathan* (1884), 12 Q.B.D. 461, 478.

<sup>3</sup> Per Hill J., *In re Barlow* (1861), 30 L.J. (Q.B.) 271, approved *Reg. v. Leicester Guardians*, [1899] 2 Q.B. 632, 639.

<sup>4</sup> *Reg. v. Bristol and Exeter Ry. Co.* (1843), 4 Q.B. 162; *Reg. v. Income Tax Commissioners* (1888), 21 Q.B.D. 313. On the analogous remedy of *action for mandamus* in respect of so-called quasi-public duties, see G. E. Robinson, *op. cit.* 234 ff.

<sup>5</sup> Short and Mellor, *op. cit.*, ch. iv; Redlich and Hirst, *op. cit.* ii. 367.

<sup>6</sup> As to the meaning of 'judicial' in this connexion, see Fletcher Moulton L.J., *R. v. Woodhouse*, [1906] 2 K.B. 501, 534 (reversed *sub nom. Lord Mayor, &c., of Leeds v. Ryder*, [1907] A.C. 420).

questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.' <sup>1</sup> The writ of certiorari directs that the record of the proceedings in some cause or matter depending before an inferior Court be transmitted into the Superior Court to be there dealt with, in order to ensure that the applicant for the writ may have the more sure and speedy justice. It may be had in either civil or criminal proceedings. Its object, especially in civil proceedings, is 'to give relief from some inconvenience supposed, in the particular case, to arise from a matter being disposed of before an inferior Court less capable than the High Court of rendering complete and effectual justice'. <sup>2</sup> The remedy is, by various statutes, made specially available in a large number of matters falling within the scope of municipal and Departmental legislation. <sup>3</sup> The writ cannot be refused if the Attorney-General applies for it on behalf of the Crown, nor if the party aggrieved is entitled to it *ex debito iustitiae*. <sup>4</sup>

Prohibition is 'a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it was not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction'. <sup>5</sup> It differs from certiorari only in the fact that it can be brought at an earlier stage of the proceedings complained of: it is preventive rather than

<sup>1</sup> i. e. certiorari and prohibition: per Atkin L.J., *R. v. Electricity Commissioners*, [1924] 1 K.B. 171, 205.

<sup>2</sup> Halsbury, *L. of E.* x, § 310.

<sup>3</sup> *Ibid.*, §§ 340-4; *Roberts v. Hopwood*, [1925] A.C. 578.

<sup>4</sup> *Reg. v. Surrey Justices* (1870), L.R. 5 Q.B. 466; *R. v. Bedfordshire C. C.*, [1920] 2 K.B. 465.

<sup>5</sup> Short and Mellor, *op. cit.* 252; cf. Halsbury, *L. of E.* x, §§ 286 ff.; Redlich and Hirst, *op. cit.* ii. 368; *Clifford and O'Sullivan*, [1921] A.C. 570; *R. v. Electricity Commissioners*, [1924] 1 K.B. 171.

remedial. 'If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, . . . prohibition will lie to restrain it from so exceeding its jurisdiction.'<sup>1</sup> Though strictly the writ can issue only to an inferior 'Court', 'as statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies'. Thus it has gone to Tithe Commissioners, Commissioners of Woods and Forests, Commissioners of Taxes, the Comptroller-General of Patents, Light Railway Commissioners, the Board of Education, the London County Council, &c.<sup>2</sup> The King's Bench has always been tenacious of this writ as being in the nature of a salutary discipline exercised over inferior Courts with a limited jurisdiction. 'My view', says Brett L.J.,<sup>3</sup> 'of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.' It has now been settled that even when the acts or regulations of a statutory body are subject to the approval of Parliament, the High Court may, even before Parliament has pronounced upon such acts or regulations, grant a writ of prohibition to restrain the doing of such things as it deems to be in excess of statutory authority.<sup>4</sup>

<sup>1</sup> Per Atkin L.J., *R. v. Electricity Commissioners*, *ubi sup.*, at p. 206.

<sup>2</sup> *R. v. Electricity Commissioners*, *ubi sup.*; and cases cited by Bankes L.J. at p. 193.

<sup>3</sup> *Reg. v. Local Government Board* (1882), 10 Q.B.D. 309, 321.

<sup>4</sup> *R. v. Electricity Commissioners*, *ubi sup.*



2. *Practical operation of these checks.*

Such are the principal constitutional checks upon the operation of delegated powers.<sup>1</sup> Parliament and the Courts exercise a general control; but we must now take into account certain facts which seem to show that the boundaries between the different 'powers' in our constitution, and in our law-making machinery, are becoming indistinct.

Executive control over Parliamentary legislation

Parliament shows an increasing readiness to surrender large portions of its control over not only the mandate itself but the actual applications of the mandate. By a curious reversal of orthodox constitutional principles, Acts of Parliament are sometimes made to depend for their validity in whole or in part on the pleasure of subordinate authorities. To that extent, though they are the work of the sovereign assembly, yet they are provisional only, and therefore not really sovereign at all. It is of no great moment, perhaps, that the operation of a Parliamentary enactment should be suspended, as it often is, until some subordinate Order, usually an Order in Council, call it into being.<sup>2</sup> A more innovating practice is that of giving subordinate authorities, again usually the Privy Council, the power of actually repealing existing statutes—the practice, in other words, of making statutes 'determinable upon condition subsequent'.<sup>3</sup> No less important is the delegated power of amending statutes, now becoming frequent. Here I cannot do better than quote some of the examples given by Mr. Carr: <sup>4</sup>

'The Companies Act of 1908 (s. 118) contained certain tables and forms in schedules, but it allowed the Board of Trade to

<sup>1</sup> For other judicial means of enforcing the liability of public authorities, such as *indictment*, *injunction*, *declaration*, and *quo warranto*, see G. E. Robinson, *op. cit.*, ch. vi.

<sup>2</sup> This device of 'appointing a day' for the commencement of an Act, especially in regard to important constitutional and administrative changes, becomes very frequent. For examples see Carr, *op. cit.* 10 ff., and cf. Ilbert, *Legislative Methods and Forms*, 213 ff.

<sup>3</sup> e. g. Administration of Justice Act, 1920, ss. 2 (3) and 4 (2).

<sup>4</sup> *Op. cit.* 8.

vary those tables and add to those forms. A schedule to the Metropolitan Police Act of 1839 contained a table of fees for taking out a summons or a warrant and so on. A later Act in 1897 provided that this table might be altered by the Home Office (60 and 61 Vict. c. 26, s. 2 (2)). An Act of 1799 specified the rates of brokerage to be charged by Dublin stockbrokers on dealings in Government securities. In 1918 Parliament allowed the Lord Lieutenant to approve rules fixed by the Dublin Stock Exchange in substitution for those in the 1799 Act.<sup>1</sup> The Weights and Measures Act of 1878 contained a table of metric equivalents. A later Act in 1897 sanctioned the varying of the table by Order in Council.<sup>2</sup> In 1882 it occurred to Parliament to protect ancient monuments such as Stonehenge and other similar relics of the past. For this purpose a number of Druid circles, earth-works, chapels, crosses, &c., were scheduled as "ancient monuments". Parliament at the same time permitted the Crown in Council to add other monuments to the original schedule.<sup>3</sup>

These are amendments only in matters of detail; but a very much larger power, which is really a power of general legislation, of 'adapting' existing statutes to new needs which have arisen or are likely to arise, is sometimes committed to the delegates of Parliament. Take, for example, the following provision:

'His Majesty may, by Order in Council, apply, with the necessary modifications and adaptations, in relation to the Air Council, and President of the Air Council, and the Air Force, and the officers and men thereof, and Air Force Property and institutions, any of the enactments relating to the Army Council, the Secretary of State for the War Department, the Army, or the Officers and soldiers thereof (including enactments conferring any powers, rights, exemptions or abatement from taxation or immunities or imposing any duties or disabilities on such officers or soldiers), or to military property or institutions, and every such Order in Council shall be laid before both Houses of Parliament.'<sup>4</sup>

<sup>1</sup> Stockbrokers (Ireland) Act, 1918, s. 1 (1).

<sup>2</sup> Weights and Measures (Metric System) Act, 1897, s. 2 (2).

<sup>3</sup> Ancient Monuments Protection Act, 1882, s. 10; Ancient Monuments Consolidation and Amendment Act, 1913, ss. 14 (4) and 24, and Sch. 2.

<sup>4</sup> Air Force (Constitution) Act, 1917, s. 13.

Under this section,<sup>1</sup> His Majesty in Council (being here, as we have seen, the *alter ego* of the War Office) 'adapted' the Territorial and Reserve Forces Act, 1907, in such a way as to create and govern an Auxiliary Air Force, enacting for this purpose what is in all essentials no less a statute than the principal Act 'adapted'.<sup>2</sup>

Provi-  
sional  
Orders  
and Pro-  
visional  
Rules.

What is happening in regard to the public legislation of Parliament has happened even more extensively, and perhaps more usefully, in regard to its private bill legislation. This latter is one of the most onerous duties which Committees of Parliament have to perform, and with the growing complexity of local government throughout the nineteenth century, it has become not merely irksome but impracticable. Accordingly the old procedure of private Acts, so far as they relate to purely local affairs, has been largely displaced by *Provisional Orders*. A Provisional Order 'may be described as an ordinance made by a department of the Government, which acquires the force of law either automatically after a fixed period, during which it may be contested by petition to Parliament, or by the express confirmation of Parliament itself—that is to say, by inclusion in a Provisional Order Confirmation Act'.<sup>3</sup> Instead of having recourse directly to Parliament for an Act conferring the powers required, the applicant goes to the appropriate Department, specified by statute, which, if it thinks fit, issues the necessary order; and the ultimate confirmation is obtained, not at the suit of the individual applicant, but of the Department, which by a succession of Confirmation Acts obtains the ratification *en bloc* of many various

<sup>1</sup> As amended by the Territorial Army and Militia Act, 1921, s. 1.

<sup>2</sup> Auxiliary Air Force Order, 1924 (S.R. and O., 1924, No. 1212). The Air Force Reserve Order, 1924 (S.R. and O., 1924, No. 1213), does the same in regard to the Reserve Forces Act, 1882.

<sup>3</sup> Redlich and Hirst, *op. cit.* iii. 254; cf. *ibid.* 357, and *In re Morley* (1876), L.R. 20 Eq. 17.

powers of this kind. Thus under the Public Health Act, 1875, ss. 175-178, the Local Government Board [Ministry of Health] is authorized to make Provisional Orders to empower the local sanitary authority to put in force, with reference to the lands referred to in any such Order, 'the powers of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement or any of them, and either absolutely or with such modifications as the Board [Ministry] may think fit'. An Act of 1899 greatly modifies the whole procedure of private bill legislation in Scotland, and in a very large measure substitutes procedure by Provisional Order.<sup>1</sup> Though this device puts somewhat formidable powers in the hands of the executive, on the whole, considering the extent of the other business before Parliament, it seems difficult to escape from it; but the ultimate control of Parliament should be preserved intact, and it is to be deprecated that a modern tendency inclines towards vesting the *confirming* authority in the executive itself. This is the method adopted, for example, by s. 9 (7) (c) of the Local Government Act, 1894, with respect to the confirmation of Orders made by County Councils for putting in force the provisions of the Lands Clauses Acts for the compulsory taking and purchase of land. So with rules made by County Councils for acquiring land for small holdings.<sup>2</sup>

Provisional Orders must be distinguished from *Provisional Rules*. We have seen that under the Rules Publication Act, 1893, a 'quarantine' period is usually prescribed during which Rules and Orders are to lie before Parliament. But by s. 2 of the same Act, a rule-making authority is empowered in appropriate circumstances to certify that on account of urgency or some other special reason a rule shall come into operation

<sup>1</sup> Private Legislation Procedure (Scotland) Act, 1899.

<sup>2</sup> Small Holdings and Allotments Act, 1908, s. 10 (2). See A. S. Quekett, 'Local Government and Devolution', *L. Q. R.* xxxiv. 357.

immediately: in which case it is valid only until the procedure previously specified by the Act has been complied with. A large number of Provisional Rules are made in this way.<sup>1</sup> Both in the case of Provisional Orders and Provisional Rules, it is to be expected that formal confirmation will tend to become very formal indeed. It is highly probable that in the mass of matter placed before it, Parliament will cavil at minutiae, and the result is that 'provisional' is liable to become a term of courtesy only. Again, however, it must be observed that the existence of Parliamentary control even *in potentia* is not altogether an illusory safeguard.

Ousting  
the juris-  
diction of  
the  
Courts.

But it cannot be concealed that as government by Departments grows, Parliamentary control diminishes. Not only is it exercised rarely in practice, but it is often abandoned to all intents and purposes by a statutory provision that Rules and Orders made under a particular Act 'shall have the same effect as if enacted in this Act'.<sup>2</sup> The House of Lords has held that the effect of this provision, provided that any specified formalities have been complied with, is to give the sub-legislation in question the same force as legislation proper and therefore to remove it from any review by the Courts.<sup>3</sup> 'I have asked myself in vain,' says Lord Herschell L.C.,<sup>4</sup>

'for any explanation of the meaning of those words; or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds all

<sup>1</sup> Carr, *op. cit.* 35.

<sup>2</sup> e. g. National Insurance Act, 1911, s. 65. In one case (the only one of which I am aware) it is added that 'the validity of such order [Order in Council] shall not be questioned in any legal proceedings whatever': Extradition Act, 1870, s. 5.

<sup>3</sup> *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347.

<sup>4</sup> *Ibid.*, at p. 359.

<sup>5</sup> 'Of the same effect as if they were contained in this Act': Patents, Designs, and Trade Marks Act, 1883, s. 101 (3).

subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule is precisely the same, that every person must conform himself to its provisions, and if in each case a penalty be imposed, any person who does not comply with the provisions whether of the enactment or of the rule becomes equally subject to the penalty.'

This form of delegation is more than delegation—it makes the executive not merely a deputy but a plenipotentiary. And it becomes increasingly common.<sup>1</sup> The result can only be confusion in the working of the constitution and obscurity in the legal conception of the sovereignty of the State. While we have never accepted in full the French doctrine of the separation of powers, it is clear that unless there is some intelligible and consistent demarcation between the different spheres of public law, antagonisms and inconsequences must ensue. It is incompatible with the whole theory of our constitution that the executive and judicial functions should seriously overlap, but there can be little doubt that the present tendency is not only to invest the executive with judicial powers, but to oust the control of the regular Courts and make the Executive judge in its own cause. I will take three recent enactments as illustrating this development. The Board of Education is a comparatively new Department of State, but its powers have grown at a surprising rate. Under the latest Education Act, that of 1921, the Board may, *inter alia*, make any order it thinks fit to frame or alter the trust deed to a non-provided school as to the appointment of managers; <sup>2</sup> it may, on the default of the local education authority, itself issue by-laws for education in any district; <sup>3</sup> it may, if the local authority

<sup>1</sup> Examples may be found in the Superannuation Acts, 1834 and 1859, which give the Treasury final decision of the amount of pension payable to a civil servant: see *Yorke v. R.*, [1915] 1 K.B. 852; Public Health Act, 1875, s. 268; Small Holdings Act, 1908, s. 39 (3).

<sup>2</sup> Subject to veto by each House of Parliament: s. 32.

<sup>3</sup> S. 47.

refuses or neglects to do so, recognize and validate the actions of the managers of a school, and indemnify them for any expenses incurred in management;<sup>1</sup> and

'if any question arises whether any purpose for which a council [local education authority] wish to exercise any powers under this Act is a purpose of the provisions of this Act relating to elementary education or of those relating to higher education, that question shall be referred to and determined by the Board of Education, and their decision shall be conclusive on the matter.'<sup>2</sup>

This last provision, it will be seen, confers final judicial powers of a very wide character on the Board and definitely ousts the jurisdiction of the Courts in questions which might be very far-reaching and of great importance to the public. It would seem to be even wider than s. 7 (3) of the now repealed Education Act, 1902, which provided for final settlement by the Board of disputes between local authorities and the managers of non-provided schools. That section gave rise to a good deal of litigation, resulting only in repeated statements by the Courts that they had no power to review Departmental decisions in such matters.<sup>3</sup>

My second example is still more recent. S. 115 of the Housing Act, 1925, reads as follows:

'(1) The procedure on any appeal to the Minister [of Health] under this Act, including costs, shall be such as the Minister may by rules determine, and on any such appeal the Minister may make such order in the matter as he thinks equitable, and any orders so made shall be binding and conclusive on all parties, and, where the appeal is against any notice, order or appointment given or made by a local authority, the notice, order or

<sup>1</sup> S. 151.

<sup>2</sup> S. 3 (3).

<sup>3</sup> *Blencowe v. Northamptonshire C. C.*, [1907] 1 Ch. 504; *Board of Education v. Rice*, [1911] A.C. 179; *West Suffolk C. C. v. Olorenshaw*, [1918] 2 K.B. 687. In *Gillow v. Durham C. C.*, [1913] A.C. 54, the defence that the Board had sole jurisdiction was not pressed, and being a statutory defence not specially pleaded, was not raised by the Court.

appointment may be confirmed, varied or quashed as the Minister thinks just:

Provided that:

- (a) The Minister may at any stage of the proceedings on appeal, and shall, if so directed by the High Court, state in the form of a special case for the opinion of the court any question of law arising in the course of an appeal; and
- (b) the rules shall provide that the Minister shall not dismiss any appeal without having first held a public local inquiry, unless the appellant fails to prosecute his appeal with due diligence . . .
- (c) The Minister may, before considering any appeal which may be made to him under this Act, require the appellant to deposit such sum to cover the costs of the appeal as may be fixed by the rules made by him with reference to appeals.'

Under the rule-making power given by sub-s. 1 above, the following rule has been made:\*

'The costs of any appeal, including the costs of any public local inquiry held in connexion therewith, shall be in the discretion of the Minister, who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof.'

Here it will be seen that the sole safeguard against arbitrary action is a special case stated for the High Court on a point of law: all other aspects of the appeal are completely within the control of the Department. The special case is in many ways a very unsatisfactory expedient: the Minister may refuse to state it, and the appellant must then apply to the High Court to compel him to do so. Thus a good deal of preliminary litigation may be necessary before the point at issue can even be considered by judicial authority, and most litigants, if they were wise, would shrink from the time and expense involved.

My third example is provided by the National Insurance Act, 1911. Under s. 15 (2) (b) of that Act, as extended by s. 32 (1) of the National Health Insurance

\* S.R. and O., 1925, No. 638, s. 9.



Act, 1918, any duly qualified medical practitioner who is desirous of being included in the medical list of an Insurance Committee is entitled to be so included, but, where the Minister of Health, after such inquiry as may be prescribed, is satisfied that his continuance on the list would be prejudicial to the efficiency of the medical service of insured persons, he may remove his name from the list or lists in which it may at the time be included and disqualify him for so long as the Minister may think fit for inclusion in the list of any Insurance Committee in Great Britain.

The form of the inquiry is prescribed in Part VI of the National Health Insurance (Medical Benefits) Regulations, 1924.<sup>1</sup> It is there provided that if any representation is made by an Insurance, Local Medical or Panel Committee to the effect that the continuance of a practitioner upon the medical list is prejudicial to the efficiency of the medical service of the insured, the Minister shall thereupon institute an inquiry. If similar representations are made by any other person or body, the Minister has a discretionary power to institute an inquiry, and he has a further power to do so, in cases where he thinks fit, in the absence of any representation.

The parties to an inquiry have power to compel by subpoena the attendance of witnesses and the production of documents, and the Minister, after considering any report on the matter made by the Inquiry Committee, has power to award costs in the same manner as an arbitrator.

For the purposes of each inquiry, the Minister constitutes a Committee consisting of three persons, one of whom must be a barrister or a solicitor in actual practice and the other two medical practitioners. It is the duty of the Inquiry Committee to draw up a report stating such relevant facts as appear to them to be established by the evidence and the inferences of fact

<sup>1</sup> S.R. and O., 1924, No. 1433, Pts. V-VII.

which, in their opinion, may properly be drawn from the facts so established. After consideration of this report the Minister takes such action, if any, as he thinks fit.<sup>1</sup>

Here, then, is a complete judicial process affecting the rights and the livelihood of many thousands of medical practitioners, as well as firms and bodies corporate which supply drugs and medical appliances.<sup>2</sup> Against the decisions of the Minister there is no appeal whatever. Suspension or removal from an Insurance Committee list may in itself be a severe detriment to a medical practitioner, amounting in some cases almost to ruin; but further than this, a means has been found to inflict pecuniary penalties which are not directly authorized by the Act, but which are indistinguishable from ordinary punitive fines. The accused doctor, without being suspended or removed, may be mulct in the costs of the inquiry; or the Minister may withhold a sum from the supplementary grant to the local Insurance Committee, with a recommendation that they recover the amount, with costs, from the doctor concerned by deduction from this remuneration 'or otherwise'. A sum of £100 is not uncommon for this purpose; and in one case a penalty of no less than £1,000 was inflicted on a medical partnership.<sup>3</sup> In another, charges of negligence against two doctors were dismissed by the Committee of Inquiry, which held that in the one case there had been merely an error of judgment, and in the other, no foundation at all for the charge; nevertheless, the Minister inflicted penalties of £10 and £20 respectively.<sup>4</sup> It is impossible to read these reports without realizing that a significant change has come over principles which for centuries have been regarded as characteristic of our law.

<sup>1</sup> Ministry of Health, *Reports of Inquiries and Appeals*, &c., vol. iii, p. 7 (H.M.S.O., 1924).

<sup>2</sup> See *ibid.*, Pt. II.

<sup>3</sup> Ministry of Health, *Reports of Inquiries and Appeals*, &c., 62.

<sup>4</sup> See *The Law Journal*, 18th April, 1925, p. 362.

These anomalies result from allowing a new Departmental procedure, not subject to appeal, to grow up independently of the ordinary legal procedure which has developed by ages of practice and experience. The unfortunate results to which the system sometimes leads may be illustrated by a case which has become famous in the law of local government. A house-owner receives notice<sup>1</sup> from a Borough Council requiring him to close a certain house as being in a ruinous condition and unfit for human habitation. He appeals, as he is entitled to do,<sup>2</sup> to the Local Government Board, and a 'public local inquiry' is held. The house-owner presents his case, an inspector makes an examination and takes evidence, and then reports to the Local Government Board. The latter considers the appeal and dismisses it. The appellant has no means of knowing how this decision has been arrived at, since the whole matter is heard in private; he never sees the inspector's report, and on applying for it is refused access to it; he does not even know how the tribunal which decides the appeal is constituted. All he can do is to go from Court to Court asking for a certiorari to bring up and quash the decision, only to be told in the Final Court of Appeal that no such remedy is open to him.<sup>3</sup>

Centraliz-  
ing in-  
fluence of  
Depart-  
ments.

With the distribution of powers among a number of local authorities, there is a strong tendency, which has been growing throughout the nineteenth century, for Government Departments to exert a powerful centralizing influence,<sup>4</sup> or what in French administrative law

<sup>1</sup> Under Housing, Town Planning, &c., Act, 1909, s. 17.

<sup>2</sup> *Ibid.*, s. 39.

<sup>3</sup> *Local Government Board v. Arlidge*, [1915] A.C. 120. The decision settles once for all that a statutory authority of this sort is 'not bound to follow the procedure of a Court of Justice'. Cf. *Wilson v. Esquimalt, &c., Ry.*, [1922] 1 A.C. 202. Cf. also *Board of Education v. Rice*, [1911] A.C. 179, where the same principle was laid down; but here certiorari and mandamus issued, on the ground that the Board had not decided the issue at all.

<sup>4</sup> Redlich and Hirst, *op. cit.* ii, Bk. II, Pt. VI.

is called *tutelle administrative*. It is not uncommon for a Department to be given a statutory right, on the default of the local authority, to assume all the local authority's powers;<sup>1</sup> and apart from this statutory sanction, a practice has grown up of issuing from Head-quarters to local authorities 'model by-laws'.<sup>2</sup> These the local authority is not bound to adopt, but finds it difficult not to do so; for if the 'office pattern' is not followed, the Department will be disinclined to give the approval which in many cases is necessary to the validity of local by-laws. The result is that a great deal of government which goes by the name of 'local' is really Government from Whitehall.

It must also be added, regretfully but in candour, that an unfortunate spirit has grown up in Crown litigation, and that in many of these matters, now so numerous through the extension of delegated powers, the representatives of the Government show a deplorable readiness to avail themselves of all technical, and many unmeritorious, expedients in order to resist substantially just claims. The whole question of remedies against the Crown, in the present state of our changing constitution, is of deep concern to the public; lawyers and laymen alike anxiously await its early and radical revision. In this matter we are much worse off than our French neighbours, who, in the remarkable jurisprudence of the Conseil d'État, possess not only a body of enlightened and consistent principles, but a stout defence against bureaucratic oppression.<sup>3</sup>

Spirit of  
Crown  
litigation.

#### IV. JURISTIC MEANING OF PRESENT TENDENCIES

Having now considered, though all too cursorily, some of the principal developments of subordinate and

<sup>1</sup> e. g. Housing and Town Planning Act, 1919, s. 4; and cf. *ante*, p. 325, on Education Act, 1921.

<sup>2</sup> Redlich and Hirst, *op. cit.* ii. 291.

<sup>3</sup> See 'Bureaucracy Triumphant', *Quarterly Review*, Oct. 1923, and 'Bureaucracy Again', *Quarterly Review*, Jan. 1925, by the present writer.

autonomic legislation in England, we must next ask ourselves what is the juridical significance of this movement and how it accords with the traditional theory of the sovereign law-making power of the State.

1. *German theory of autonomy.*

The theory of autonomy, owing to certain peculiar historical aspects of German law, has been considerably canvassed by German jurists.<sup>1</sup> The most complete and systematic account of it is given in Gierke's *Deutsches Privatrecht*, and since his view also represents the orthodox doctrine of German jurisprudence, I propose here to give a short account of it.

General history and theory.

Autonomy, according to Gierke, is the power of a properly organized association (*Verband*), which is not a State, to make law for itself.<sup>2</sup> The law which is thus established is, in the true sense of the term, *objective*<sup>3</sup> and binding, and must be clearly distinguished from mere subjective law. It may, in other words, be properly described as *legislative*. In Germanic law many associations have had this power, subject always, how-

<sup>1</sup> Gierke, *DPR.* i. 142; Brunner *apud* Holtzendorff, *Rechtslex.* s.v. *Autonomie*; Windscheid, *Pand.*, § 19; Regelsberger, *Pand.*, § 24; Gerber, *DPR.*, § 29, and *Arch. für civ. Pr.* xxvii. 35; Gray, *Nature and Sources of the Law*, App. IV.

<sup>2</sup> Regelsberger (*loc. cit.*) notices three kinds of autonomy: (1) The regulation of a particular legal transaction by principles agreed upon by the parties (*Privatverfügungsrecht, Privatautonomie*). [This seems to be merely *convention*, not autonomy.] (2) The legislation of States which, as members of a larger federation, are subject to the legal arrangements of the higher entity. Such laws are not properly autonomic, but *allgemeine Gesetze*. (3) The legal powers of particular corporations invested with power to make their own internal arrangements. According to Brunner (*loc. cit.*) autonomy exists 'wherever the objective right of individual wills leaves free scope for the establishment of concrete legal relationships'.

<sup>3</sup> The distinction, common among Continental jurists, between 'objective' and 'subjective' law is not easy for English lawyers to grasp. Broadly, it consists in this—that objective law consists of general, uniform principles, subjective law of those principles applied to particular cases. Autonomic law is therefore not to be considered as arising *ad hoc* out of extraordinary circumstances, but as part of the general legal system.

ever, to the limitation that it must not conflict with the law of any higher authority, especially the State. Autonomy was thus a fruitful source of law in the Middle Ages. Its true nature for long remained obscure. In the characteristic theory of medieval jurisprudence only the Pope in spiritual matters, and the Monarch in temporal matters, possessed the true prerogative of legislation. But in fact there arose a number of other bodies which exercised analogous powers. To these medieval jurisprudence allowed only a *potestas leges ferendi* fundamentally different, it was considered, from the true *potestas statuendi*; but at the same time it was recognized that these autonomous enactments had the force of law *within the association itself*. Hence arose a whole science of *statuta*,<sup>1</sup> to which was attributed great law-making force. General rules of private law became more and more distinguished from the regulations (*Beliebungen*) of societies and corporations. After the Peace of Westphalia, a *general sovereignty* was recognized as existing only in the constitutional powers of different statutes, and with it went the true prerogative of legislation (*Gesetzgebung*); but side by side with this a *ius statuta condendi* was ascribed to many associations, notably to territorial communities. Two different kinds of laws—*Gesetz* and *Satzung*—thus established themselves in German jurisprudence. But a contrary tendency set in. The medieval theory yielded to more modern doctrines which strove with growing success to attribute all true sovereignty to the State, and to invest it with a monopoly of all legislation properly so called. Autonomy came to be considered either as an example of mere delegation or of freedom of contract (autonomy by consent). Jurisprudence began to distinguish between *statuta legalia* and *statuta conventionalia*, the latter, truly considered, being not objective but subjective law. This theory, however, is inconsistent with the actual working of autonomic legislation,

<sup>1</sup> 'State' legislation retained, and still retains, the name of *Gesetz*.

the self-contained validity of which has never been wholly lost. But it has been inevitable that with the growth of centralized power in modern States the sphere of autonomy should become increasingly restricted. It has lost its medieval meaning and can play only a limited part in modern private law. Nevertheless, even in modern law it is a distinct and operative source of law.<sup>1</sup>

Particular  
forms

It has shown itself chiefly in the peculiar law applicable to the High Nobility;<sup>2</sup> in local legislation of various communities,<sup>3</sup> of which Rostock and Wismar alone still retain their codes; in the self-government of ecclesiastical communities;<sup>4</sup> in the legislation of public law corporations and corporations of private law,<sup>5</sup> the ordinances of which are often more than mere

<sup>1</sup> 'Die Autonomie ist daher im heutigen deutschen Privatrecht als eine selbständige und eigenartige Rechtsquelle anerkannt.' Gierke associates it with modern manifestations of his cherished theory of corporate personality; but with this we are not immediately concerned.

<sup>2</sup> This dates from the fourteenth century, its origin lying in the special fitness which the noble families were considered to possess for the development of Common Law rules, they being the 'governing classes' and large landowners. It was a form of family solidarity, operating sometimes through decrees of the head of the family, sometimes through collective resolutions of the members. It grew rapidly after the reception of Roman Law, and became a whole separate sphere of customary law. It was ratified and guaranteed to the families concerned, after the partition of the realm, by the *Bundesakte* (Art. 14, Z. 2) and is still part of the law of Germany. It applies specially to succession, guardianship, contractual relations of the members of the family *inter se*, marriage arrangements, and general rights of property. See further, Gerber, *DPR.*, § 29; Brunner, *loc. cit.*; Stobbe, *DPR.*, § 20; Schuster, *German Civil Law*, 579.

<sup>3</sup> *Ante*, p. 65. See Brunner, *loc. cit.*

<sup>4</sup> Cf. Gray, *op. cit.*, and *ante*, p. 303.

<sup>5</sup> We have no equivalent for the *offentlich-rechtlichen Korporationen* of German law. They correspond generally to those corporations in English law which exist for the purposes of administrative government—e.g. local authorities. (In this sense 'corporation' in English—the Mayor and Corporation—has acquired a special sense in popular if not in legal parlance.) They include also universities; but the most

conventions, and may be considered as objective law. All these forms of autonomy constitute separate bodies of law affecting *particular legal relationships* (*Sonderrechtsverhältnisse*); they do not affect the main body of private law but are binding only inside the corporation. Exceptionally, however, by special statutory authority, they may be binding on third persons—e. g. in the domain of public law, the laws of communities relating to police, commercial rules, &c., and in the domain of private law, the special privileges of the noble houses, which all citizens are bound to respect. The conditions of their validity are: (1) that they must be established by a properly constituted organ of the association, i. e. by formal decision either of the aggregate or of its representatives duly appointed in that behalf; (2) that they must be expressed in the form required by the constitution of the association; (3) that they must receive the approval of the State. This last condition greatly limits their scope, but does not affect their inherent validity. It still remains true, despite the eminent control of the State, that these autonomous rules arise from a source different from that of enactments in the ordinary sense. The *Statut*, when approved, still remains a *Statut*, and does not become a *Gesetz*; and the formal sanction given to it in no way affects its actual contents.<sup>1</sup> In general, then, these autonomous laws are to be regarded as standing side by side with State legislation rather than as being an offshoot of it. They are valid in so far as they do not clash with 'sovereign' law, and from that point of view they must be examined by the Courts and

Their  
effect.

Condi-  
tions of  
validity.

prominent example in German law is the State itself as *Fiskus*—a conception unknown to our jurisprudence. They are distinguished from charitable foundations (*Stiftungen*), trading corporations, and unincorporated associations formed for purposes other than profit. See Schuster, *op. cit.* 32.

Brunner (*loc. cit.*) considers the rules of private corporations to be not truly autonomic but merely consensual.

<sup>1</sup> Cf. Windscheid, *loc. cit.*



declared void if they exceed the limits of legitimate autonomy.<sup>1</sup>

In this theory, then, autonomic law *is law*, but it must not be inconsistent with the general law of the land, or else it is liable to abrogation by superior decree. Its importance from our present point of view is that it arises not as a mere by-product, so to say, of the sovereign power, but spontaneously. This at least is true of much of the autonomous government of corporate bodies. On the other hand, in many of the examples we have considered, especially those of Departmental legislation, the powers in question are clearly not spontaneous, but are directly *created* by major legislation. However, once the power has been given, the delegated authority tends to develop within itself a body of principle and procedure which may be considered as autonomic.

2. Duguit's  
theory of  
devolution.

✓ But in recent times new theories of sovereignty and State organization have sought to put a totally fresh complexion on the meaning of devolution. In particular, the theories of Professor Duguit call for consideration.<sup>2</sup> In order to understand his view of decentralization in the modern State, it is necessary first to grasp the main jurisprudential principles to which this part of his teaching is subsidiary—principles which are repeatedly and vigorously insisted on in all his works. As I understand them, the essentials of his

<sup>1</sup> Gerber (*loc. cit.*) appears to be the only jurist of repute who denies to autonomic legislation the true force of law. According to him, it is only a *special* part of the ordinary law of the land. See especially *Arch. fur civ. Pr.* xxvii. 35, 62.

<sup>2</sup> Duguit's chief works, apart from his two important treatises on Constitutional Law, are: *L'État* (vol. i, 1901: *Le Droit Objectif et la Loi Positive*; vol. ii, 1903: *Les Gouvernants et les Agents*); *Le Droit Social, le Droit Individuel et l'État* (2nd ed., 1911); *Les Transformations générales du Droit Privé* (1912); *Les Transformations du Droit Public* (1913) (translated as *Law in the Modern State* by F. and H. Laski). Parts of *L'État* are translated in *Modern French Legal Philosophy* (Modern Legal Philosophy Series). The clearest and most succinct statement of his main principles is to be found in *Le Droit Social*.

doctrine may be reduced to the following main propositions :

1. Law is essentially and indeed exclusively a social *fact*. It is not in any sense a body of *rights*. The conception of law as a system of rights must rest on an ethical basis. But this has no real existence. There is no such thing as *subjective right* either in the State or in the individual ; the terms ' social right ' and ' individual right ' are meaningless. As for ' natural right ', it was, like the ' general will ', a term invented by the eighteenth century merely as a set-off against the pretensions of absolutist sovereigns. The first thing, then, to grasp about law is that it has no relation whatever to any ideal Right, but merely sets up an *objective situation* as between State and individual on the one hand, and between individual and individual on the other hand.<sup>1</sup>

Law an objective fact, not a system of rights.

2. But what is this objective state of fact? It must be the product of some governing principle. It comes into existence in obedience to the natural and inevitable law of *social interdependence*, or (though M. Duguit pre-

The law of social interdependence.

<sup>1</sup> In all this, and indeed throughout his work, M. Duguit is much influenced by Comte. ' I should like ', he writes (*Le Droit Social*, 12), ' to post up the following passage of Comte in the Chamber of Deputies : " The word *right* deserves to be banished from political terminology as much as the word *cause* from philosophical terminology. Of these two theologico-metaphysical concepts, that of *right* must henceforth be considered immoral and anarchical, that of *cause* irrational and sophistic. . . . *Right* has no true meaning unless it emanates from a superhuman will. In its struggle against theocratical authorities, the metaphysic of the last five centuries invented so-called human rights which at best could possess only a negative function. At the first attempt to give them a truly organic significance, they immediately betrayed their anti-social character by striving everlastingly to consecrate *individuality*. In the State of the actual world, which recognizes no celestial prerogative, the idea of right disappears for ever *Every man has duties towards every other man, but no man has any rights properly so-called*. . . . In other words, *the only right which any man can possess is the right always to do his duty* " (*Système de Pol. Pos.* i. 361). ' The principle contained in the concluding phrases is often cited by M. Duguit with applause.

fers to avoid this term on account of the base uses to which it has been put) *social solidarity*. Now this is a constant and indispensable law arising out of the mere *fact* of social grouping. 'All society is a discipline, and as man cannot live apart from society, so he cannot live apart from discipline.' 'Solidarity is nothing more or less than the fact of interdependence uniting the members of human society, and particularly the members of a social group, by reason of the community of needs and the division of labour.'<sup>1</sup>

Function  
of the  
State and  
authority  
of law.

3. When the idea of *right* is thus eliminated, what becomes of the function of the State? The traditional conception of the State has been that of the concentration of *public power* enforcing rights and duties. This is totally erroneous, and must be dismissed, along with the traditional doctrine of *sovereignty*, which is its characteristic expression. The modern world is getting rid of the dogma of sovereign *will*, either in its Romanistic form founded on *imperium* and *dominium*, or in its post-Revolutionary form of *popular sovereignty*. The idea that the supposed will of the State represents the supposed will of the people is untrue to fact; formulated law is the product simply of the individuals who happen to possess the legislative power and has no necessary relation to the wills of the majority of the people. Nevertheless, it is obligatory because, so long as the governors consist of a composite majority of all parties and classes, the law which they make embodies, or ought to embody, the fundamental rule of society—that of social interdependence.<sup>2</sup> Rules of this kind, representing fractions of the general sociological law, M. Duguit calls *normative* or *constructive* laws. It fol-

<sup>1</sup> *Le Droit Social*, 6 ff.; cf. *Transformations du Droit Public*, 77. The whole principle of social interdependence is worked out with great particularity in *L'État*. Again it is much influenced by Positivist sociology.

<sup>2</sup> This M. Duguit calls throughout his work *la règle de droit*; but I avoid the term 'rule of law', since it has acquired a special meaning in English Law.

lows from the rejection of sovereignty that the traditional conception of the absolute and unquestionable *authority of law* must also be abandoned. That conception rested on four basic principles: (i) Law was an act which could emanate only from the people or its representatives; (ii) Law, being an emanation of the sovereign will of the State, could not be subject to control either by way of judicial process or by way of remission in individual cases, nor could its framers be made legally responsible for its provisions; (iii) Law, being an emanation of the sovereign power, was one and indivisible, like sovereignty itself; hence there could not be in the same country different laws for different territories or different groups; (iv) Law, being a command, was always a *unilateral* act: *law* and *agreement*<sup>1</sup> were two mutually exclusive terms: therefore there could be no such thing as laws existing by mere agreement.<sup>2</sup> None of these propositions can be considered true in the modern State.<sup>3</sup>

• 4. It follows from the foregoing principles that all theories of the *personification of the State* are pure fiction. In particular, German theories in this respect are repudiated as entirely valueless. State—Government—consists simply of a number of individuals entrusted with certain duties: like all other individuals, they are subject to the supreme objective law of social interdependence. All acts of all governmental agents are therefore the acts of individuals, but they have a special legal significance because they are juristic acts (*actes juridiques*) which form a part of the general functioning of the transcendent social law.<sup>4</sup> The actual operation

The State  
not a  
person.

<sup>1</sup> *Convention*: but again this term has a special meaning in English law.

<sup>2</sup> *Lois-conventions*.

<sup>3</sup> *Transformations du Droit Public*, 85 ff., q.v., for further elaboration of these arguments.

<sup>4</sup> 'I define an *acte juridique* as a declaration of will emanating from a competent person, having as its object a thing which that person can voluntarily determine in accordance with a legal end and done with the intention of creating a juristic situation': *Droit Social*, 70.

of government must therefore be attributed to individuals, not to any mystically-personified corporate will. *L'État est mort!*<sup>1</sup>

Public  
service the  
founda-  
tion of  
public  
law.

5. What, then, is the State? In modern law, it has become a central agency not for the exercise of public power but for the performance of *public service*. In recent years the idea of the *responsibility of the State* has grown so greatly as to change the whole character of the State in social and legal theory.<sup>2</sup> The organ which once was expected to guarantee only certain fundamental services, such as defence, police, and administration of justice, now undertakes to guarantee innumerable public services; and the doing of this, and only this, has become its essential function. *The notion of public service replaces the conception of sovereignty as the foundation of public law:*<sup>3</sup> and public service may be defined as

'every activity the accomplishment of which ought to be regulated, assured and controlled by the governors, because it is indispensable to the realization and development of social interdependence and because it is of such a kind that it cannot be adequately guaranteed except by the intervention of the governing power'.<sup>4</sup>

All 'normative' and 'constructive' laws can be referred to this main principle.

'In public law men no longer believe that behind the individuals who possess the governing power there is a collective *substance*, personal and sovereign, whereof they should be merely the mandatories or organs. In our governors we see nothing more than a number of persons who possess in a particular

<sup>1</sup> *Droit Social*, 40.

<sup>2</sup> Here M. Duguit is able to support his thesis by abundant evidence of the growth of the principle of administrative responsibility (for *excès de pouvoir* and *détournement de pouvoir*) in the jurisprudence of the Conseil d'État. Though it is not denied that the responsibility of the State is a growing factor in all modern constitutional theory, it cannot be forgotten that M. Duguit's arguments would not apply in anything like the same degree to English law.

<sup>3</sup> *Transformations de Droit Public*, 33.

<sup>4</sup> *Ibid.* 57.

country a preponderating power, and on whom there consequently falls the obligation of fulfilling a certain social function—the duty of organizing public services and of guaranteeing and controlling their operation.’<sup>1</sup>

6. The State is the only *central* power for the maintenance of public services; for the rest, since these services daily grow in number and complexity, they must be carried out by means of *decentralization* and *federal syndicalism*. The scope of Government action becomes more and more restricted as the sphere of group-government expands.

Decentralization  
and  
federal  
syndicalism.

‘The function of the Governors must necessarily diminish continually and confine itself to supervision and control, because all economic and social functions gradually tend to become divided up among different social classes, who acquire, by the development of syndicalism, a definite juristic structure, and will therefore be able, under the control of the governing body, to give stimulus and direction to that portion of social work which falls to their task.’<sup>2</sup>

M. Duguit sternly discountenances the revolutionary syndicalism of Sorel and Berthe, deprecating all violence in the transformations of social arrangements, and preaching a syndicalism of his own. This he sums up as follows :

‘We must see in syndicalism a movement which tends to give a definite juristic structure to the different social classes,<sup>3</sup> i. e. the groups of individuals who are already combined by community of task in the division of social labour. . . . Thus there is established a co-ordination of the different classes among themselves, which reduces social conflicts to a minimum and at the same time affords powerful protection to the individual within his own particular group against the excessive claims of other classes and against arbitrary action of the central power.’<sup>4</sup>

Such combination does not involve the destruction or even the weakening of personality: the process

<sup>1</sup> *Ibid.* 279.

<sup>2</sup> *Droit Social*, 43.

<sup>3</sup> Of which there are many: he specially attacks the Marx-Engels fallacy that capital and labour constitute the only two classes in society.

<sup>4</sup> *Droit Social*, 122.

between group and individual is one of mutual reinforcement—the individual finds himself by losing himself. And the distribution of power among groups is the great counteraction to any despotic use of the central power. The result—so we are to understand—is a general ‘balance of power’ in the community. M. Duguit attempts to set no limits to the process of devolution. Even government officials are to be organized by a *syndicalisme fonctionnariste* and to possess an *autonomie fonctionnelle*.<sup>1</sup>

Such is the process, I hope not inaccurately represented, by which M. Duguit arrives at his principles of decentralization and group-government. It is clear that his syndicalism is syndicalism at the expense of the State; indeed, it is hard to see why, if the progression he indicates follows a logical course, any functions which can now be attributed to the State should not in a comparatively short time disappear altogether. It would be beyond my present purpose to enter upon an examination of the general theory of syndicalism in industry, and I have contented myself with glancing at its jurisprudential aspects as they seem to emerge from M. Duguit's doctrines. But it is interesting to note in passing that recent experience seems to show that M. Duguit's conception of the State does not necessarily result from the process of decentralization which he describes so forcefully, and which is undoubtedly apparent throughout European society. The newest theory of government in Europe, that of Fascism, has found it expedient to recognize a very considerable element of syndical group-government; but far from derogating thereby from the

<sup>1</sup> This is a comparatively new feature in M. Duguit's teaching, and is advanced for the first time in *Le Droit Social*. Any such organization is at present illegal by French law; but M. Duguit adduces evidence of a strong tendency in this direction. Again his arguments are specially relevant to French society; they could not be applied in the same degree to England: but I should not be prepared to say, without further investigation, that they would find no support in other countries.

authority of the State, it has co-ordinated the powers of groups with a heightened and accentuated conception of the claims of the State. It is as yet too early to say whether this theory has completely justified itself in practice.

Professor Duguit is undoubtedly one of the most original and stimulating of modern jurists. He resolutely refuses to be bound by any social or legal principles, or supposed principles, which he has not thought out for himself, and he is almost completely in revolt against the traditional axioms and even terminology of jurisprudence. Since jurisprudence, like every other science, is doubtless in danger of becoming enslaved to formulae, which are accepted too often in a spirit of unquestioning complacency, it will suffer no harm from the agnostic spirit of a bold thinker and trenchant writer who is prepared to take nothing for granted. The greatest value of M. Duguit's work lies in his insistence on the systematic exposition of the principle of responsibility of the State. I began this book by emphasizing the necessity for regarding law as essentially the product of social forces, not of sovereign will; and in that aspect of his teaching also M. Duguit has done good service to jurisprudence. But he goes far beyond any sociological theory of law which has yet been advanced when he attempts to evaporate all ethical essence out of law. Law is a social growth and a social necessity; but that does not in the least mean that it is unrelated to moral as well as to economic forces. To banish the notion of *right* wholly from law, as M. Duguit seeks to do, is to make it meaningless, and revolts an instinct which is deep-seated in human nature. It explains nothing to say that the law of social interdependence is a mere fact which involves no ethical principle. The state of fact cannot be accepted and applied as the basis of social institutions without the operation of human will and human judgement, themselves constantly concerned

3. True meaning of present constitutional changes.

Law, right, and justice.



with moral considerations. It has been well asked — even if this fundamental law be accepted as the basic 'fact' of society, why is it considered obligatory? Why is it deemed to impose duty, unless it confers some corresponding right? Why does the community accept this social law as good and necessary *in itself*? In brief, law which is unconnected with right is not law at all; and M. Duguit has laid himself open to the criticism that his ultra-materialism is in reality only a form of idealism—that in postulating the irrefragable social law, which he calls a mere existing fact, he is really postulating a constant of ideal law which other jurists would call natural law, or 'natural law with variable content'.<sup>2</sup> It was Gierke who, before Duguit, insisted that 'the origin of law goes hand-in-hand with the origin of humanity. Men could not be men unless an instinct of Right (*Rechtstrieb*) ruled among them.' But above all is the idea of *justice*, which is 'like the idea of the true, the good or the beautiful, comparable only with itself and carries its own justification in itself. Hence the highest aim of all separate rules of law is the realization of justice.'<sup>3</sup> M. Duguit's transports of realism have not shaken, and I believe are not likely to shake, the faith of the world in this essentially and immutably ethical element in all law. The truth is that, in his distrust of a metaphysic which he believes to have become sterile by inordinate child-bearing, he goes to an extreme which forces on him a fallacy as grave as any he condemns.

The limits  
of 'public  
service'.

It is in the same spirit of exaggeration that he refers all law to the notion of public service. Law is not concerned, and cannot be concerned, solely with material needs, though doubtless that is the greatest part of its province. But there is a whole sphere of humanitarian, aesthetic, and spiritual considerations with which the

<sup>1</sup> Gény, *Science et Technique*, ii. 251.

<sup>2</sup> Charmont, *La Renaissance du Droit Naturel*, ch. xi.

<sup>3</sup> *DPR*. i. 112 ff.

law also has to reckon. A man must live, and no doubt the first responsibility of the State is to assure him the means of living. But large sections of every community would deem it as essential that the law of the land should stand for liberty of private opinion and of religious conviction as that it should guarantee the physical means of subsistence. 'The governors' owe more than a negative duty not to interfere with these things; it is part of their responsibility to ensure positively that they shall not be interfered with. Yet this cannot be called a 'public service' in M. Duguit's sense of the term. Again, what of the humanitarian and charitable legislation which forms a large and growing part of the law of any modern State? M. Duguit is forced to admit that the law of social interdependence is insufficient to meet this case. 'Something more' is needed—the sentiment of pity for human suffering. Whether it be acquired or innate matters not: it is one of the most precious attributes of civilized man in the twentieth century; it must find a place in our ruling political system, which should comprehend every aspect of man (*qui doit saisir le tout de l'homme*).<sup>1</sup> What is this 'something more'—further described as a 'spectacle of justice'—but a moral element in the law which is quite, and increasingly, indispensable to every civilized society?

The  
authority  
of the  
State.

The same almost morbid fear of 'metaphysic' prompts M. Duguit's denial of the personality of the State. One may or may not agree with him in his rejection of German distinctions and dogmas which cannot altogether escape the charge of pedantry; but is it a satisfactory alternative to declare that there is *no State at all*, but merely a number of separate officials operating in separate spheres? How is it possible to realize the aim of public service, even granting that to be the sole end of the State, without enduing the State with some collective quality over and above the

<sup>1</sup> *Droit Social*, 67 f.

personalities of the individuals composing it? Greatly though everybody must deplore the abuses of representative government, it is not in accordance with the facts to say that Governments and Assemblies are merely fortuitous collections of individuals who happen to be seized of governmental power. Is the only *de jure* element in representative government the subordination of the *de facto* governors to a primordial law of social interdependence? The severest critics of modern politics would find it difficult to carry their criticisms so far. It is subversive in tendency and untrue in fact to deny to the State all attribution of power. This book will have totally failed of its purpose if it has not demonstrated one principle—that law cannot be regarded simply as the *creature* of a central sovereign power; but it is an utterly different thing to say that when the whole material of law, derived from such different sources, has consolidated itself in a civilized society, there shall not be a power set up and recognized for the enforcement of legal rules. That power is the State. Lacking it, law in the modern world becomes without form and void; for it would be a strange condition of social existence if the sole ascertainable sanction for positive law were a vague 'law of social interdependence' to be determined only by the speculations of sociologists. The undeniable fact of legal devolution in modern States is therefore not inconsistent, and must not be allowed to become inconsistent, with the authority of the State.

Devolu-  
tion v. dis-  
integra-  
tion.

If it does become so, devolution can only mean disintegration. Disintegration is, indeed, the manifest danger of the present phase of social change. On the face of it, the more groups in society—the greater the scope of group-government—the greater the possibility of conflicts between groups. That danger M. Duguit ignores; his assurance that constitutional syndicalism will result in a greater harmony of society rests upon no demonstration whatever. One searches in vain in

this jurisprudential exposition of syndicalism, as well as in the theories of industrial syndicalism and guild-socialism, for any satisfactory explanation of how the innumerable interests of innumerable self-governing groups are to be reconciled and harmonized. The tendency towards decentralization is, I believe, irresistible and not mischievous in itself: to condemn or repudiate it is merely to bid the waves recede; but it can only work beneficially for society if a central influence—the State, though possibly a much modified form of State—controls it firmly and intelligently. The alternative, it would seem, is that the process of disintegration can mean for Europe only a general dissipation of energy and a pulverization of existing systems without the substitution of any constructive principle.

The tendency towards decentralization is, I repeat, irresistible. Constitutions and Governments must adapt themselves to it. The only reliable means by which this can be done is a scientific system of administrative law. This exists in full vigour, and on the whole with advantageous results, in most European countries; but the absence of it in England imperils the healthy growth of those elements of change which are mistakably evident in the English constitution at the present time. On all sides—legislative, executive, and judicial—these changes are plain to see; in themselves, they do not necessarily portend any calamity—at all events, the whole trend of social development seems to make them inevitable; but they must and do produce anomalies, if, in a spirit of intransigent conservatism, we make no effort to fit them into our constitutional system. It is no longer possible to regard Parliament as the sole and supreme governor of this kingdom, or to adhere, with any semblance of truth, to unqualified doctrines of the separation of powers, of the Rule of Law, and of the royal prerogative. At every turn hard facts make those doctrines in no small measure illusory. We have progressed beyond the age

The  
present  
need in  
England.

of legal fictions, and it is not in the interest of the republic that we should cling to fictions which have outworn their usefulness. There is no reason in principle or convenience why we should do so; we are not obliged, for example, to regard the Rule of Law—or at least that aspect of it which insists on a single system of judicature for all kinds of suits—as a Revealed Truth, when the whole tendency of legislation makes it more and more a shibboleth. Again, there is no reason whatever why we should not take in hand so essential a matter as remedies against the Crown, frankly recognizing that the embodiment of the State in the royal prerogative is a glaring anachronism in present social conditions. It is clear that *some* new principles and methods are necessary in our public law; if they do not take the form of an explicit system of administrative law, they will assuredly take that of bureaucratic law—a sore affliction for any community which has to live under it. The process of decentralization must therefore be regulated by a modified conception of legal sovereignty and an adaptation of constitutional principles, which, far from destroying the authority of the State, will lend it greater efficacy by giving it easier poise. The trunk is sound, the young shoots show every sign of vitality: why should we not, by pruning away the dead wood, stimulate the health of the whole tree? The introduction of a rational and scientific system of administrative law is the greatest need in the whole English legal system to-day. It will not come of itself, out of the void; it is doubtful, though many think the reverse, whether it can grow to any sturdy stature, as the Common Law has grown, empirically. It seems unlikely to come at all except by the way of deliberate creation. Let us, then, deliberately create it, while still respecting tradition, preserving continuity, and blending the old with the new in that amalgam which alone is the material of true progress.

## SUMMARY

Reviewing our conclusions concerning legislation as a source of law: Legislation is the characteristic law-making instrument of modern societies, expressing a relationship between the individual and the State. It is not, however, a relationship, taking the form of a command, merely between superior and subordinate. It represents a process of action and reaction between constitutionally organized initiative and spontaneous social forces. While it cannot be said of a great deal of modern legislation that it is in any real sense a direct product of 'popular consciousness' or 'the will of the people', and while it is true, in the phrase of Dicey, that 'laws foster law-making opinion', yet there is in society a prevailing current of opinion which necessarily and fundamentally influences the spirit of legislation. For the efficient working of the machinery of government, there should always be a harmony between legislative enactment and this dominant trend of public opinion.

To understand the authority of statute, it is necessary to grasp the forms which it has taken in our law. In medieval England there was no conscious doctrine of the separation of powers: the legislative and administrative spheres had not yet become distinct. 'Legislation', not necessarily in imperative form, is primarily a rule emanating from the king; and it is not till the fourteenth century that we get something like a standard type of enactment of uniform authority and operation for the whole realm. Consequently our early records of 'legislation' are highly imperfect. Until the activities of the Record Commission in the early nineteenth century, the only sources of information were private editions of statutes and the received tradition of the profession. From early times, many projects were mooted for the revision of the statute-book, which was in a state of the greatest disorder and

obscurity, but it was not until the nineteenth century that the work of reform was thoroughly carried out. Diversity of form often led to doubts as to authority of particular statutes. Though in the thirteenth and fourteenth centuries statutes, if proved to be executed in due form, had peculiar authority as emanating from the sovereign, and though they are not to be regarded as merely confirmatory of or subsidiary to a fundamental Common Law, it is probably not till the end of the fifteenth century that the absolute authority of statute, as understood to-day, settles itself in our law. It is now settled beyond doubt: the modern doctrine is that Parliamentary enactment is absolutely unlimited in scope and authority. Certain limits have sometimes been supposed to exist, viz. (1) Conformity to the law of God or to 'common right and reason' or to 'natural equity'. It is doubtful whether this supposed rule has ever been literally applicable in our law; it amounts to little more than that the Courts will not, if they can avoid doing so, so interpret a statute as to produce injustice or absurdity; and in modern times it takes the form that so far as possible statutes are presumed to be in accordance with existing law, and especially existing Common Law. (2) Conformity to international law. This has never been a positive restriction, and only means that as far as possible the Courts will construe Acts of Parliament consistently with the comity of nations. But there are certain limitations more real than these: (1) Statute cannot prescribe that which is impossible of performance. (2) Penal statutes made *ex post facto*, and statutes directed against individuals, though theoretically still possible at the pleasure of the legislature, are so contrary to prevailing modern opinion that they may be said to be now unconstitutional for all practical purposes. (3) No statute can immortalize itself by forbidding its own repeal in the future. (4) Public opinion is the real and actual, though not the legal, check upon legislation.

A statute, under the rule established after some fluctuations of theory, is of binding force on the whole realm as soon as it has received the royal assent. It may subsequently be repealed at any time either expressly or by implication. Express repeal explains itself, but has been complicated in the past by the unwieldy character of statutory records; implied repeal is governed by the principle *leges posteriores priores contrarias abrogant*. A statute in English law is never abrogated by mere disuse; but in practice a great many ancient statutes, being quite incongruous in modern surroundings, may be considered as dead letters though they have never been formally repealed.

Statute has to be applied by the Courts, and its purport and effect therefore become largely the product of judicial interpretation. The first task of the Judge is to determine the literal or grammatical meaning of the words chosen by the legislator. Here the Court is much in the hands of the draftsman, and the inevitable inadequacy of language, which has to be strictly construed, is always a serious defect in legislation considered as a source of law. There can be no invariable rule for the interpretation of words and phrases in a statute; but words must always be considered in their context and subject to the *eiusdem generis* rule. And it is the 'golden rule' of the construction of all enactments that literal interpretation serves only as a means for the ascertainment and application of the general purport of the Act, or *ratio legis*. The expression of the legislator's will must invariably be considered not only by itself but with the natural consequences flowing from it. The Judges must always endeavour to preserve the balance between the strict meaning of isolated expressions—which meaning they cannot disregard if it is plain and imperative—and a reasonable, just, and convenient interpretation of the statute as a whole. The general purpose as well as the literal terms of the enactment must be kept in view. Without considering



extrinsic elements like the parliamentary or social history of a course of legislation, or surrounding circumstances incidental to the enactment but not an integral part of it, a Court must have regard to the general 'policy of the statute'. This embraces, according to the rules laid down in *Heydon's Case*, the existing Common Law at the time of the passing of the Act, the modification of the Common Law which the Act had in view, the nature of the remedy provided, and the reason for providing it. The Court also has to consider cases not expressly provided for in terms by the statute, but arising under it. Here Judges are said to lay down the rule which the legislator would have laid down if he had considered the omitted case; but in reality it is often difficult to say what the will of the legislator would have been in the unforeseen circumstances, and the Judge must then—and very frequently does—deal with the *casus omissus* according to his own discretion and the general principles of logic and social policy in which he has been trained. A very great part of the operation of statute-law therefore depends on the exercise of the judicial office. But the Judge has no discretion where the language of a statute is unambiguous; and since the language of statutes is often imperfect, and sometimes forces the Courts to results which do not seem to have been intended by the legislator, it is on the whole better that general principles should be developed by the Common Law than by the inelastic methods of Acts of Parliament.

There is a marked tendency at the present time for the legislative powers of Parliament to be delegated to a number of subordinate authorities. The traditional theory of the English constitution is that the legislative sovereignty of Parliament is unique and without competitor, and that the Rule of Law ensures a single and uniform administration of justice for all persons and all causes. This view cannot be said to accord with present facts and tendencies.

Press of business and increase of purely technical problems have compelled Parliament to delegate extensively. The result has been the rise of a number of organs of government which gain increasing influence. Among these may be mentioned : (1) the Privy Council, which has wide powers to legislate by Order in Council, either as an exercise of the prerogative or under authority expressly conferred by statute, and which acts in reality as a sanctioning body for rules made by Government Departments ; (2) various ' rule-making bodies ' created by different Acts such as the Rules Committee of the Supreme Court, which controls matters of practice and procedure ; (3) local authorities, which, with the great spread of local government during the nineteenth century, have acquired important powers of making by-laws of great variety and force in everyday affairs ; (4) the executive, to which the power of making Rules and Orders is entrusted by statute with growing frequency and widening scope. In addition to these authorities specially designated by legislation, a number of corporations within the State—such as ' public utility companies ', the Church, Universities, &c.—have autonomous powers of providing for their own internal constitutions, and in many cases of making by-laws for the general public ; while in industry there is a pronounced development of group- or syndical government both on the side of labour and of capital.

The actual form of subordinate legislation is largely governed by the Rules Publication Act, 1893, which makes—though with important omissions—Statutory Rules and Orders as accessible to the public as the statutes of Parliament. The safeguard of publicity is augmented by various constitutional means of control exercised by Parliament and the Courts. Most Rules and Orders become binding only after they have been approved by Parliament, or at least have not been disapproved, or have satisfied certain preliminary conditions laid down by particular enactments ; but the

actual exercise of Parliamentary veto is rare, though the possibility of its being imposed is a valuable check *in potentia*. Judicial control operates chiefly through the doctrine of *ultra vires*, to which all subordinate legislation is *primá facie* subject; and it is entirely within the discretion of the Court to say whether a minor enactment properly falls within the authority under which it purports to be made. As to by-laws, certain judicial tests have become well established; but on the whole the Courts lean towards a benevolent interpretation of by-laws. A general disciplinary control is also exercised over public and quasi-public authorities by the prerogative writs of mandamus, certiorari, prohibition, and analogous processes; by means of these, subordinate authorities may be compelled on the one hand to carry out their appointed duties, on the other hand to keep within their respective jurisdictions. Some of these checks tend to be modified or weakened in present circumstances. It becomes more and more common to make the operation of Parliamentary legislation dependent for its commencement and validity on Orders made by the executive. A good deal of what used to be Private Bill Legislation has been supplanted by Provisional Orders made by Departments. There is a tendency to derogate from Parliamentary control by providing that Rules and Orders when made shall have the same effect as an Act of Parliament. This expedient gives the executive original rather than delegated powers, and leads to confusion in the different spheres of government. Similarly there is a tendency to oust the jurisdiction of the Courts, and remove a salutary judicial control, by making the Department judge in its own cause both at first instance and on appeal. The functions of the Executive are therefore constantly growing at the expense of the other powers in the State, the more so because Departments exercise a strong centralizing influence over local administration. Further, the claims of the Crown against indi-

viduals are often asserted in a manner which is uncompromising to the point of being unconscionable, and a *summum ius* is pressed in a manner which would be considered discreditable in private litigation.

Autonomous or subordinate Government is therefore a common feature of modern societies. Its jurisprudential bearing has been the subject of much German theory, according to which autonomous law is certainly law of spontaneous growth, and not merely a by-product of sovereignty; but it must not conflict with the general law of the land, and to that extent is subject to superior control. The widespread tendency towards decentralization has excited much discussion in recent years, and special importance must be attached to Professor Léon Duguit's ingenious and vigorous theory of 'federal syndicalism'. M. Duguit's reasoning rests upon the denial of the power of the State except as a means for guaranteeing essential public services, upon the conception of the 'objective law of social interdependence' as the sole authoritative source of law, and upon a system of government by industrial, professional, and administrative groups. While there is great value in his insistence upon the growing responsibility, social and legal, of the State, and his examination of the various social factors in law, his general theory of the State and sovereignty is not here accepted. The tendency towards decentralization of government is irresistible, but the only means of ensuring its harmonious working is a strong regulative power in the State. Constitutions must be adapted to this end. At the present time the English constitution is not so adapted. It is still attempted to found new needs and new methods of government upon the principles of the royal prerogative and the Rule of Law. The result is an uneven and confused functioning of constitutional machinery. The new elements are in no sense unadaptable to the new needs; but in order to provide a sound working basis for our constitution as

it now seems to be developing, our jurisprudence needs to be supplemented by a body of administrative law which will ensure the proper distribution of governmental powers and at the same time readjust the legal relations between individual and Government.

## APPENDIX A

### JUDICIAL TESTS OF FOREIGN CUSTOM

SOME brief observations have been made (pp. 35 ff.)<sup>1</sup> on the importance of Eastern custom to English lawyers. It should be added that the tests applied to such customs by English Courts are substantially the same as those which have established themselves in the English Common Law,<sup>2</sup> and which are discussed above; and it is submitted that here too the tests all tend in the same direction—viz. proof of the actual existence of the custom in practice. 'What the law requires,' the High Court of Madras has laid down, 'before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has by common consent been submitted to as the established governing rule of the particular family, class or district or country'; and the Judicial Committee adds, in the same case on appeal: 'Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.'<sup>3</sup>

But it is clear that when a dominant people is dealing with the customs of a different civilization and of different religions, the tests of reasonableness, morality, and public policy must be looked at from an angle somewhat different from that which would be appropriate to English society. In general, British administration has endeavoured to leave indigenous customs intact, however alien they may be to Western and Christian notions; but where they are considered to violate elementary

<sup>1</sup> Trevelyan, *Hindu Law* (2nd ed.), 28; Mayne, *Hindu Law and Usage* (8th ed.), 56 ff.; Roy, *Customs and Customary Law in British India*, 24, and cases there cited.

<sup>2</sup> *Swanaranja Perumal Sethurayan v. Muttu Ramalinga Sethuraya* (1866), 3 Mad. H.C. 75, 77; S. C. on appeal, *sub nom. Ramalakshmi Ammal v. Swanantha Perumal Sethuraya* (1872), 14 Moo. I.A. 570.

considerations of humanity and decency, they are either rejected by the Courts, or, more frequently, suppressed by legislation. The best-known example is that of the *suttee* which, as early as 1829,<sup>1</sup> the British Government found it necessary to forbid. Similarly the practice of adopting females under the age of sixteen as dancing-girls in pagodas has been held to constitute the offence of procuring minors for prostitution under the Indian Penal Code, ss. 372 and 373.<sup>2</sup> In English society there is, as a rule, not much doubt about the accepted standard of morality; but for the Westerner in Eastern dominions it is sometimes difficult to determine what the true morality of the situation is—to preserve the balance between a wise tolerance and insistence on axioms of civilized corporate life. On the whole, the British Courts have applied only those principles of morality which they consider to be common to all civilized peoples, without giving them a dogmatically Occidental—and of course not necessarily a Christian—colouring.<sup>3</sup>

Again, it is clear that some of the more artificial tests recognized in English law would be quite inappropriate in other surroundings. A 'legal memory' dating from the first year of Richard I would be meaningless in India: accordingly judicial decisions have established an equally arbitrary but equally useful period for the antiquity of Indian customs.<sup>4</sup>

<sup>1</sup> By Reg. XVII of that year.

<sup>2</sup> For other examples of customs which have been held immoral or contrary to public policy see Trevelyan, *op. cit.* 31, Roy, *op. cit.* 556 ff., and Mayne, *op. cit.* 62 ff. They are chiefly concerned with marriage and prostitution.

<sup>3</sup> At first sight, some of the decisions in this matter seem to force English notions on foreign institutions, rather in the spirit of the *Tanistry Case* (*ante*, p. 99). Doubtless in England a contract by which a prospective bridegroom promised to pay a consideration to the father of the prospective bride would be held contrary to public policy; but there seems to be no reason why this interesting relic of marriage-by-purchase, as practised among some Hindus, should be shocking to the English conscience; but it has been disallowed by the Courts. However, the true ground for the rejection would seem to be that the alleged custom, even if proved, would be expressly contrary to the Manu Code itself (Roy, *op. cit.* 558 ff.). In one case at least, the Judicial Committee seems to have been prepared to apply the peculiar principles of English trusteeship to the guardians of a temple; but here again the principle involved appears to be one of common honesty rather than of technical equity: *Rajah Vurmah Valia v. Ravi Vurmah Mutha* (1876), L.R. 4 I.A. 76, 85.

<sup>4</sup> *Doe d. Jagomohan Rai v. Srimati Nimu Dasi*, Montriou's Cases in Indian Law, 596; *Garurudhwaja Parshad Singh v. Saparadhwaja Parshad Singh* (1900), L.R. 27 I.A. 238.

As to the methods of proving custom, where local rules of evidence exist and are recognized by British Courts, they must be taken as valid in establishing the existence of custom, however greatly they may differ from English rules. Notable among these is the *Wajib-al-uruz*, a collection of village administrative documents made in pursuance of Reg. VII of 1882, regularly entered up, kept in the office of the Collector, and authenticated by the signatures of the officers who make the entries. It serves as a record of general customs as well as of individual proprietary rights in villages: it is admissible as evidence under the Indian Evidence Act, and is accepted by the Courts as *prima facie* evidence of a custom: see Roy, *op. cit.* 97, 581, and *Musammatt Lali v. Murli Dhar* (1906), 22 T.L.R. 460.

As to the effect of non-Christian customs in Egypt see Art. 90 of the Ottoman Order in Council, 1910, continued in force by the Egypt Order in Council, 1915: *Bartlett v. B.*, (1925) A.C. 373.

## APPENDIX B

### REASONABLENESS OF CUSTOM

THE number of cases, especially old cases, concerned with the reasonableness of custom, is large, and I cannot hope that my examination of them has been exhaustive. I have, however, endeavoured to examine all those which are cited in the principal authorities, including the chief Abridgements, and I venture to hope that none of primary importance has escaped notice—though that is always possible in the mass of our case-law. Such decisions—and they are many—as deal only indirectly with the point have been designedly omitted from consideration here.

One preliminary observation must be made with regard to the older cases. The reports are often so scanty, or the decisions so much concerned with technical points of pleading, that it is difficult to know what evidence of the actual existence of the alleged custom was before the Court. It is only when we come to later times and fuller reports that it is possible to gather any certain information on this point; and it is not always easy even in the more recent cases.

1. We may consider first a number of miscellaneous cases, not falling within any particular group, in which customs have been judicially declared unreasonable; and in all of them we



shall find that proof of existence of the custom fails, or, at the least, is highly suspect.

*Sara de Richford's Case* (1330), Y.B. 3 Ed. 3. 38 (Mich. pl. 12) : In a writ of entry, a custom was alleged that the inheritance was departible among male heirs. *SRONORE J.* : 'In no place in England are tenements departible at common law, except in Kent, among male heirs ; hence if any allege that tenements are departible among males anywhere else, this usage cannot be valid if it is not actually observed, and you do not prove this in fact (*cest usage ne peit valer sil ne fuist use, et vous ne montres ceo en fait*).'

Sufficient evidence of actual user is clearly wanting here.

*Anon.* (1370), Y.B. 43 Ed. 3. 32 (Mich. pl. 30) : A custom alleged in a vill that if a tenant was two years in arrears with his rent, the lord might enter and dispossess him until agreement was made for the arrears. 'And inasmuch as the usage was alleged solely in this one vill, and in no others in the neighbourhood, it was held by *KNIVET* and the whole Court, that it was a bad usage to oust a man of his inheritance, &c.'

The reason given seems to mean that the Court did not believe that the custom was really established as 'local law'. 'Inheritance' seems to be used loosely of a termor's possession.

*Anon.* (1466), Y.B. 4 Ed. 4. 18 (Mich. pl. 30) : Trespass for digging in the plaintiff's close, which was four acres of land adjoining the sea in Kent. Defence, that 'all the men of Kent' had been used from time immemorial, when fishing in the sea, to dig in adjoining land in order to pitch stakes to hang out and dry their nets. *Nelle* : 'He has said that the men have used, &c., and this is not a good prescription, for he ought to show *which men*, &c.'

This objection seems to have been the ground of decision. The custom is unreasonable because it is too vague and uncertain—i. e. on the facts and on the pleadings it is not shown to be resident in any ascertained class of persons. There the case ends, so far as the *ratio decidendi* is concerned ; but the rest of the discussion, on reasonableness generally, is interesting enough to be worth quoting :

*CHOKE J.* : 'This custom cannot be good, for it is against common right to prescribe to dig in my land, but there are other customs, which are used throughout the whole land, and such customs are legal : e. g. that of innkeepers who are chargeable for the goods of their guests, if the goods are stolen, &c. And also there is another custom that if my neighbour guard his fire negligently, so that through his negligence my house is burned, he will be liable to me : and such customs are good.'

LITTLETON J. : ' Custom which prevails throughout the whole land is common law, like the cases that you have cited, &c. And, Sir, a custom which can stand upon reason shall be allowed, e. g. the custom of primogeniture ; but this custom is against reason, for if he can dig in one place, he can dig in another. And so, if a man had a meadow adjoining the sea, they [the fishermen] by this custom could destroy the whole meadow, which would not be reasonable.' •

DANBY J. : ' Those who are fishers in the sea can justify their going upon the land adjoining the sea, for such fishery is for the common wealth, and for the sustenance of all in the realm. This is common law.' *Quod fuit concessum* . . .

*Fairfax* : ' In the cases just mentioned of the innkeepers, &c., the customs are reasonable, for the innkeeper has a profit by his inn, and therefore a *quid pro quo*. And similarly my neighbour will have the same advantage against me if his house be burned by my negligence, as I shall have against him ; but, Sir, this custom which goes to the destruction of my inheritance cannot be good, for though fishery may be for the common wealth, yet the common wealth cannot destroy my inheritance, for I shall not have advantage by such fishery, &c., and those who are fishers can be allowed parcel of [other ?] land adjoining the sea for drying their nets.'

An interesting modern parallel with the above case is *Mercer v. Denne* (1905), 2 Ch. 538, where, however, there was no question of fishermen *digging* in land adjoining the sea, but merely of going upon it to dry and oil their nets. The custom was held to be good. The case is also instructive as to the kinds of documents which will be admitted in evidence in proof or disproof of the existence and reputation of a custom.

*Barker v. Cocker* (1621), Hob. 329 : A claim for tithe-lambs. A custom was alleged that all the lambs in the parish were ' cast and reckoned together as if they were but one man's ' : the Vicar could then take his tithe where he chose, with the result, as the Court pointed out, that a man who owned one lamb might lose his all, whereas another who owned a great many might contribute nothing. The Court held that ' the pretended custom ' was unreasonable and against law.

Small wonder that the custom was merely ' pretended '. It is highly improbable, though the report is silent on the point, that a custom so absurd and inequitable on the face of it can have been supported by any satisfactory evidence.

*Owen v. Stainhow* (1683), Tho. Jo. 199 : An alleged custom to elect a canon to succeed in the next vacant place, there being no vacancy at the time. ' The Court thought that the custom was ridiculous, to

chuse where no canonry was vacant.' An application for mandamus to hold the election therefore refused.

Again absurd on the face of it, and unlikely to have any basis in fact.

*Taylor v. Scott* (1729), FitzG. 55: Alleged custom in a parish to pay 10d. to the incumbent for churching every woman 'at the time of her being churched, or at the usual time when she should be churched'. *Held* (the sole ground of decision): too uncertain, there being no evidence as to what was 'the usual time', &c.

The uncertainty apparently existed in the pleadings rather than in the facts, for the custom does not seem unreasonable on the face of it.

*Bastard v. Smith* (1837), 2 Moo. & R. 129: The stanners of Devon claimed a right by custom to divert water from streams into their mines and dig trenches on the lands of third persons. The claim was founded on ancient charters, which appeared to confer this right in Cornwall; but it was disputed whether it extended to Devon, the Devon charter differing in material particulars from that of Cornwall. It was therefore contended that the custom in Devon, if it existed at all, had grown up by mere usurpation.

Evidence was given of acts alleged to be done in pursuance of the custom, and of reputation.

It was contended (1) that the custom was unreasonable in itself even if established, (2) that it was not established by the evidence.

Tindal C.J.'s charge to the jury is so instructive as to the relation between legal unreasonableness and evidence of actual user, that I venture to quote it at some length:

'As to the argument addressed to you, touching the unreasonableness of the custom, although you are not called on to say whether this be a reasonable custom or not (for that is matter of law, not submitted by the present pleadings to your decision), still you may properly thus far look to the nature of the custom, that, if you find it greatly affecting the rights of private property, you may fairly expect and require that it should be supported by evidence properly strong and convincing. . . . You cannot, indeed, reasonably expect to have it proved before you, that such a custom did in fact exist before the time of legal memory, i. e. before the first year of the reign of Richard I; for if you did, it would in effect destroy the validity of almost all customs: but you are to require proof, as far back as living memory goes, of a continuous, peaceable and uninterrupted user of the custom, and then you should enquire whether any document, or memorial, of more ancient times, is produced, tending to *disprove* the existence of the custom at that early period to which the law looks back.—If you think the custom

is proved, either in the terms in which it is pleaded, or subject only to certain exceptions and qualifications, you will find your verdict for the defendants, telling me what those exceptions and qualifications are : if you think the custom is not proved at all, your verdict must be for the plaintiff.

The issue is thus put to the jury purely as one of fact. They found for the plaintiff: which can only mean, on the Judge's direction, that the custom was unreasonable because it was 'not proved at all'.

*Rogers v. Brenton* (1847), 10 Q.B. 26 : This case concerned the interesting custom of 'bounding' in Cornwall. According to that custom, any person might enter on the waste land of another, and mark out, by four corner bounds, a definite area. A written description of the plot of land so marked out was recorded in the Stannary Court and proclaimed at three successive Courts ; if no objection was made, the Court awarded a writ to the Bailiff of the Court to deliver possession of the said ' bounds or tin work ' to the bounder, who thereupon had the exclusive right to take all tin and tin ore from the land bounded, paying a ' tin toll ' to the owner of the soil.

Up to this point the custom was undisputed ; but it was further claimed that the right, once established, might descend to executors and *might be preserved for an indefinite time, either by actually working or paying toll, or by annually renewing the four boundary marks on a day certain.*

It was with regard to the latter part of the custom that the dispute arose. The plaintiff, having ' bounded ' an area of the defendant's waste, had ceased to work the minerals or to pay toll for eighteen years, and had merely renewed his boundary marks annually *pro forma*.

The custom was held unreasonable and void as to the latter part of it. Lord Denman (at p. 58) explains how the alleged right of maintaining a squatter's possession by a mere annual formality would defeat the whole purpose and utility of the custom : its reasonable basis being, in the common interest, that if the owner of the soil did not work the minerals, a bounder should be entitled to do so, on payment of a fair toll to the owner. This is certainly the view of the custom which commends itself to common sense and public policy.

Now it is true that in this case the jury had found the *whole* custom, including the disputed part of it, proved in fact. But on this finding of fact Lord Denman observes, at p. 59 :

' When the evidence in this case is referred to, the variations and uncertainties in which those are involved who contend that the bound owner need not work strongly favour the conclusion in law at which we have arrived. The jury, indeed, have drawn a conclusion of fact from the whole, which, as such, we should not feel disposed to disturb ;

for it was their province to draw it from the statements submitted to them. But, on reading the report, and finding, among other things, that there is a conflict among the witnesses who from professional habits might have been supposed best able to speak to the point, whether even an annual renewal of the bounds be necessary to preserve the ownership in the bounds, and also that much reliance seems to have been placed on the fact, entirely inconclusive, that owners of land have in many instances not proceeded as for forfeiture of the bounds where the mines have not been worked, we see every reason to believe that the unqualified right now claimed is but an abuse of the original limits of the custom, inconsistent with its object, and not to be sustained on any principle.

Although, therefore, the Court was prepared to hold the custom unreasonable in any event, the actual observance of the custom claimed seems to have rested on a basis of fact which was slender, to say the least.

2. A group of decisions which may be called 'usurpation cases'. Something has been said already (*ante*, p. 48) as to customs which arise not so much from the *consensus utentium* as from imposition by a powerful upon a weaker class. This tendency is frequently to be found in cases concerning feudal customs. It was a natural temptation for feudal overlords, and others possessed of valuable customary rights against a servient class, gradually to extend or 'usurp' powers beyond the scope and *rationale* of the original custom. The Courts constantly had to guard against these insidious encroachments, which were held to make the custom unreasonable. This principle is so important that in the highly authoritative *Case of Tanistry* it is stated as the *sole* ground of the unreasonableness of custom.

And with regard to the various customs which have been adjudged void in our books, as being unreasonable, against common right or simply against law, if their nature and quality is considered, they will be found injurious to the multitude and prejudicial to the common wealth, and to have their commencement for the most part through oppression and extortion of lords and great men. [A number of examples are given.] . . . All these customs, while they are beneficial to lords in particular, still because they are prejudicial to the multitude of subjects, or to the common wealth in general, and commence by tort and usurpation, and not by the voluntary consent of the people, are therefore adjudged unreasonable and void in law. (*Tanistry Case* (1608), Dav. 28, 32b f.)

These frequent usurpations have been steadfastly restrained

by the Courts (much more, of course, in past times than at present) on the principle that all excess is obnoxious to the Common Law. In Coke we read:

It was also resolved that the reasonableness of the fine shall be judged by the Justices; and if it appears to them to be excessive, it is against law and shall not bind; for *excessus in re qualibet jure reprobatur communi*, as excessive distress is prohibited by the Common Law [and by Stat. Westm. I]. Excessive or outrageous Aid is against law. . . . An excessive fine at the will of the lord shall be said oppression of the people. And if tenant in dower has villeins or tenants at will who are rich, and she by excessive distress and fines makes them poor and beggars, it is by the law adjudged to be against law, and to be waste, as appears in, &c. . . . Such intolerable oppression of poor villeins and tenants at will is *ad exheredationem* of him in reversion, and against the Common Law of the land. . . . If fines and copyholders of a manor are uncertain, the lord cannot demand or exact excessive and unreasonable fines; and the copyholder may deny to pay it, and the reasonableness of the fine shall be determined by the Justices. (*Godfrey's Case* (1615), 11 Rep. 42a, 44a.)

Usurpations of this kind may, indeed, be supported in some cases by fairly ancient practice, because 'the multitude' may not have had strength or opportunity, during a long period, to call them in question; in such circumstances the Courts, looking at the original reasonable basis of the practice, will not hesitate, despite proved continuance of the usurpation, to repress it. But in the majority of cases we are left with a distinct impression that the attempted extension of a reasonable custom rests upon very questionable grounds of user and antiquity: that the lord is, in other words, 'trying it on', and when challenged, is unable to justify his usurpation by satisfactory proof of actual recognition of the usage. In that event, the Court has still less hesitation in declaring the dubious custom 'unreasonable'.

The principal cases of this kind are as follows:

*Robert-at-Mille v. Benet* (1401), Y.B. 2 H. 4. 24 (Trin. pl. 20): A custom claimed in a manor that 'none shall put his cattle into his land before the lord'.—MARKHAM J.: 'This is a marvellous custom, &c.' 'And *tota Curia* said that the tenants cannot lose their profit, and that this cannot be a good custom.'

Markham's scepticism as to the fact of user is undisguised. The result of the custom would be that before the tenants could put their cattle to graze, they would have to wait on the will and pleasure of the lord, and so 'lose their profit'. 'But if

'a day is limited it is otherways.' The custom seems to have been advanced somewhat half-heartedly, for 'Skrene later waived the custom and avowed generally for damage feasant'.

Anon. (1431), Y.B. 9 H. 6. 44 (Mich. pl. 27) : Custom alleged in a Court Leet that if the petty jury made any false presentment, and it was found false by the grand inquest, the petty jury should be fined. 'And all the Court held that this cannot be a custom : for it is against common right, and is extortion. But if it were used that if the [petty jurors] conceal anything which ought to be stated, they should then be amerced; this could be well-founded in custom (*ceo peut gesir en custome*).

The matter at issue was of more than local importance; for if the custom claimed had once crept into the innumerable Courts Leet throughout the country, the already invidious task of the petty jurors might have become intolerable.

Anon. (1506), Y.B. 21 H. 7. 20 (Pasch. pl. 2) : Custom claimed in a manor that every tenant who distrained for damage feasant should impound the offending cattle in the park of the lord, or else pay a fine.—KINGSMILL and FISHER JJ. : 'This prescription is invalid, because it is against common right and Common Law. Because whenever anybody finds cattle damage feasant on his land, by law and common reason he can distrain them there so found and impound them wherever he please on his land, and the lord is not thereby damnified, and has no loss; whence it follows that the distrainer ought not to be compelled to impound the cattle in the lord's pound. And if the tenants of a particular vill like to recognize as a legal rule that anybody who holds so much land shall pay annually to the church of that vill a certain sum, and shall pay 20d. fine to the lord of the said vill for every default: then although this constitution has been observed from time immemorial, nevertheless that custom is of no force, because by the default of payment to the Church the lord suffers no loss, since he has no gain by that payment. [*Aliter* if the penalty were payable to the guardian of the church] . . . If any such custom as the present has been in use, the custom or prescription is of no validity.'

The last words seem to indicate some scepticism as to proof of the custom. The illustration has the air of being based on an actual case within the personal recollection of the Judges.

Parton v. Mason (1561), Dyer 199b : The lord of a manor claimed the right by custom (1) to seize the best beast of any tenant of the manor dying within the manor, without saying 'for an heriot' or 'in the name of an heriot'; (2) if the best beast of such tenant were eloiigned before seizure, to seize the best beast, levant and couchant, of any other tenant of the manor. In pursuance of the second part of the alleged custom, the plaintiff's ox was seized, and he sued in tres-

pass.—*Held*: the plea stating the custom 'was not good for the matter of the prescription, nor for the form'.

There are no details of the evidence of the custom, which, on the face of it, certainly seems highly unreasonable, and was probably a somewhat barefaced attempt to extend unwarrantably a legitimate heriot custom. A similar custom, in much the same circumstances, was also held void and unreasonable in *Wilson v. Veise*, *Dyer, ibid.*

Here we may mention several cases, possibly hypothetical, possibly based on actual but unrecorded disputes, referred to by Littleton and Coke.

Litt. s. 209 (Co. Litt. 139b): Also if the lord of a manor will prescribe that there hath been a custom within his manor time out of mind of man, that every tenant within the same manor shall make fine *at the will of the lord* [these words, *a le volunte le d.* are found only in Letton and Machlinia's edition: see Wambaugh, *Littleton on Tenures, ad loc.*], and have made fine to the lord of the manor for the time being, this prescription is void. For none ought to make such fine but only villeins. For every free man may freely marry his daughter to whom it pleaseth him and his daughter. And for that this prescription is against reason, such prescription is void.

Coke adds an explanation of the distinction between this supposed custom and that of *merchetum*. Littleton then goes on to mention the valid customs of gavelkind and Borough English; and continues:

Litt. s. 212 (Co. Litt. 141a): But if a man will prescribe that if any cattle were upon the demesnes of the manor, there doing damage, that the Lord of the Manor for the time being hath used to distrain them, and the distress to retain till fine were made to him for the damages *at his will*, this prescription is void: because it is against reason that if wrong be done any man, that he thereof should be his own judge, for by such way, if he had damages but to the value of an halfpenny, he might assess and have therefore £100, which should be against reason. And so such prescription, or any other prescription used, if it be against reason, this ought not nor will not be allowed before Judges: *quia malus usus abolendus est.*

Apparently a hypothetical—and an extreme—case. Coke's chief illustration is the *Tanistry Case*, the reasons for suppressing which have been discussed above (*ante*, p. 99).

We next come to two cases which raised substantially the same point:

*Harbin v. Green* (1617), Hob. 189: The Bishop of Sarum, as



owner of certain mills in the city of Sarum, claimed a custom that all inhabitants of the city, being tenants of the Bishop, were bound to have all the grain *spent in their houses* ground at the Bishop's mills, and to pay for the grinding.—So much was allowed as a good custom; but the Bishop further claimed the same right as to all grain *brought into and sold in* the houses of his tenants. This part of the alleged custom was held unreasonable and void.

*Coriton v. Lithby* (1672), 1 Vent. 167, was a similar case and decision, but the judgement proceeded on points of pleading.

It was pointed out that the first part of the custom was perfectly reasonable, the 'considerations' being mutual; the Bishop maintained the mills and supplied machinery, servants, &c., while the inhabitants got their grain ground at a (presumably) reasonable price. But the second part of the custom looks like an attempt at extension unwarranted either in fact or reason; in effect, it would prevent the tenants from selling anything but ground grain. Its justification in actual usage may well be doubted.

*Broadbent v. Wilkes* (1742), Willes 360: The lord of a manor, and his grantees of mineral rights, claimed a right by custom to put earth, clay, stones, coal, timber, &c., anywhere on lands 'near' the mineral workings, at his and their will and pleasure. The plaintiff's close adjoined the mineral workings. The custom was held unreasonable. Apart from its vagueness, it 'tended to destroy his [the plaintiff's] estate, and defeat him of the whole profit of his land, and savours much of arbitrary power'.

The next case raised, in comparatively recent times, an important point as to the liability of the grantees of mineral rights on certain estates for causing the subsidence of houses situate above the mineral workings.

*Hilton v. Lord Granville* (1845), 5 Q.B. 701: Action on the case for digging so as to withdraw support from the plaintiff's dwellings. Pleas: that the houses in question were situate in a royal manor, in which the defendant had licence to work mines. He claimed (1) a right *by prescription* to dig under houses, no more than was reasonably necessary for mining purposes, paying a reasonable compensation for any damage done; (2) the same right *by custom*.—*Held*: the prescription and custom claimed were oppressive and unreasonable. LORD DENMAN C.J.: 'A claim destructive of the subject-matter of the grant cannot be set up by any usage. *Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd.* That the prescription or custom here pleaded has this de-

structive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument.'

The case has been frequently attacked. The dictum of Lord Denman which I have italicized was disapproved in *Rosbotham v. Wilson* (1856), 6 E. & B. 593, 602 (affd. 8 E. & B. 123 and 8 H. L. 348). In *Blackett v. Bradley* (1862), 1 B. & S. 940, Cockburn C.J. said of *Hilton v. Lord Granville*: 'It cannot be denied that the decision itself has not met with the universal approval of the profession, and it may be desirable that the validity of that decision should be brought under the consideration of a Court of error.' Nevertheless, inasmuch as it had not been expressly overruled, it was followed in *Blackett v. Bradley*. In *Wakefield v. Duke of Buccleuch (ubi inf.)*, Malins V.-C. was strongly pressed to regard *Hilton v. Lord Granville* as unauthoritative, but he refused to do so. This last-mentioned case may now be considered.

*Wakefield v. Duke of Buccleuch* (1867), L.R. 4 Eq. 613: The custom claimed was virtually the same as in *Hilton v. Lord Granville*. MALINS V.-C. held that: (1) the law is settled that it is the duty of the grantee of mineral rights not to let down the surface to the prejudice of dwellings situate thereon; (2) against this settled rule of law, a custom is alleged. 'The evidence wholly fails to establish such a custom'; but even if it did, the custom, on the authority of *Hilton v. Lord Granville*, would be bad and void in law.

The evidence seems to have 'wholly failed' in both cases. Lord Denman's chief point, that the custom would involve a plainly paradoxical derogation by the lord from his own grant, raises a strong presumption against it, though his dictum is clearly too wide *quoad a royal* grant. On the other hand, the unreasonableness is somewhat mitigated by the fact that the lord admitted his liability to pay compensation; and it is for this reason that the decision has been questioned.

It will be noticed in some of these cases that the words 'prescription' and 'custom' are used interchangeably. It need hardly be observed that this is mere looseness of language..

It will also be noticed that in several of the cases the unreasonableness turns largely on the fact that the lord, &c., is claiming something for nothing, whereas in the custom restrained to its proper limits, he is reasonably claiming something in return for a *quid pro quo* which he himself is giving; see, e. g., *Harbin*

v. *Green* and the examples given by Littleton; see also the reasoning in *Anon.* (1466) Y. B. 4 Ed. 4. 18 (*ante*, p. 360), and *Anon.* (1506) Y. B. 21 H. 7. 20 (*ante*, p. 366). This is what Comyns means by his principle that a custom is unreasonable 'if it be to the prejudice of any one, where there is not an equal prejudice or advantage to others in the same case' (*ante*, p. 98).

3. Another class of cases, not unlike the last, consists of those in which the 'usurpation' takes the form of attempting to extend a custom beyond its *local sphere of operation*. It is of the essence of custom that it is 'local law'. 'Custom', said Willes J. in *Mayor &c. of London v. Cox* (1866), L.R. 2 H.L. 239, 274, 'is the local law of and for inhabitants, and not for strangers casually in the place'; and the same principle is strongly insisted upon by Jessel M.R. in *Hammerton v. Honey* (1876), 2 W.R. 603. But it not infrequently happens that by gradual encroachment the custom tends to be exported beyond its proper borders, or to be applied to persons who are not in any true sense 'inhabitants' naturally subject to it. It then loses the true characteristics of custom, and the unwarranted expansion of it, based not on long and continuous practice but on sporadic encroachments, is declared unreasonable. There can be no such thing as extraterritorial custom. Among the cases already discussed, *Bastard v. Smith*, in which a custom properly belonging to Cornwall was attempted to be extended to Devon, is a good illustration of this tendency. The other principal cases are:

*Topsall v. Ferrers* (1618), Hob. 175: A custom was set up, applying generally to the City of London and particularly to the parish of St. Botolph's, that if any person died within the parish and was taken away to be buried elsewhere, a certain sum (not stated) was to be paid to the parson of the parish, as well as 'in the chancel' and to the churchwardens. The defendant's wife died within the parish and was buried elsewhere, and the customary sums were claimed; but she was not a parishioner, and it would appear (though it is not expressly stated) that she was merely passing through the parish, and was probably taken ill there. Held: that 'this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for a night, should be forced to be buried there, or to pay as if he were; and so upon the matter to pay twice for his burial'.

A clear case of attempting to extend 'local law', in the words of Willes J., to 'strangers casually in the place'.

We next come to a group of cases concerning tolls, all of which exhibit the same tendency to carry a local custom beyond due limits.

*Haspurt v. Wills* (1671), 1 Vent. 71: The City of Norwich claimed a custom that inasmuch as it maintained a common quay for the unloading of vessels, every vessel *passing through the river* should pay a toll, *whether it unloaded at the quay or not*. *Held*, unreasonable.

*Prideaux v. Warne* (1674), 2 Lev. 96: A similar claim was made, in respect of all ships *passing through the river*, by the Lord of the Manor of Padstow, on the ground of his maintaining, by custom, a quay at one point on the river. His riparian land was a very small portion of the whole river bank. He also claimed a right to distrain for tolls unpaid. *Held*, unreasonable.

These claims could have been dismissed on principles other than those of customary law. They are both cases of 'toll-thorough'—i. e. a toll claimed by a private individual in respect of the use of a *public* highway, stream, &c. Now it is settled law that a toll-thorough cannot be claimed by mere prescription, but 'must be supported by a good consideration performed in respect of the precise locality where the toll is claimed': *Smith v. Shephard* (1591), Cro. Eliz. 710; *Hill v. Smith* (1812), 4 Taunt. 520; *Brecon Markets Co. v. Neath and Brecon Ry. Co.* (1872), L.R. 7 C.P. 555. The toll-thorough therefore might well apply to those who used the quay, the 'good consideration' being that the corporation in the one case, and the lord in the other, maintained the quay; but it obviously could not be claimed from those who were merely *sailing past* the quay.

Somewhat similar is the ground of decision in the two following cases.

*Geere v. Burkensham* (1683), 3 Lev. 85: A custom was alleged in the Manor of Miching that if any ship went ashore on the soil of the manor, the lord was entitled to take the best anchor and cable of the ship. *Held*: that the custom was void and 'without consideration'.

*Simpson v. Bithwood* (1702), 3 Lev. 307: A similar custom was set up in another manor; but, in contrast with the case last cited, it was stated as part of the custom that the lord should take care of the shipwrecked, bury the dead, &c.; and the anchor and cable were 'in consideration' of these services. The custom was therefore *held* good, for 'although it be a charity, yet 'tis not unreasonable to have a recompence for a man's charity and charge'.

*Simpson v. Bithwood* enables us to understand the (at first sight) cryptic statement in *Geere v. Burkensham* that 'no custom

of salvage was found': either the Lord of the Manor of Miching claimed a right without in fact observing any duty of 'salvage' towards the shipwrecked, or if any such duty existed in practice, it was not pleaded. In either case, the lord's claim, unsupported by any service rendered by him, becomes mere arbitrary extortion. It resembles the 'usurpation cases', but I have included it here, for convenience, among the cases concerned with shipping customs.

A clear and simple case of a custom being imported into one locality from another is

*Sowerby v. Coleman* (1867), L.R. 2 Ex. 96: The inhabitants of the parish of Lilley claimed the right to enter upon the Manor of Lilley, at all seasonable times of the year, for the purpose of exercising and training horses thereon. The Manor of Lilley was not within the parish of Lilley. The same right was claimed for the inhabitants of the adjacent hundred of Hitchin and Pirton.

It is not clear what evidence was adduced of the antiquity and reputation of the custom; but in any case the Court held it void in law. KELLY C.B. doubted whether there was any recorded instance 'where the inhabitants of one parish have established a claim to the exercise of such a right in another parish'. He points out the danger of allowing a custom of this kind to grow beyond its proper limits. 'The claim tends to widen its extent, and, if held valid in the smaller division, might spread in the course of time to the neighbouring hundred, or even to the neighbouring county': with the result that it might go very decidedly to the destruction of the lord's inheritance.—CHANNELL B.: 'I rest my judgement on the fact that the right . . . is claimed on behalf of a parish to be exercised in a place not within the parish.'

Finally, there is a group of cases concerned with customs of the Lord Mayor's Court in the City of London. The most important of these deals with the custom of foreign attachment in that Court, and is another plain example of a custom extended beyond its proper sphere. The custom of foreign attachment (now fallen into disuse) is thus explained by Lord Selborne L.C. in *Mayor &c. of London v. London Joint Stock Bank* (1881), 6 App. Cas. 393, 399: 'Foreign attachment is an incidental process against a Defendant to a suit, who has not appeared, having been summoned according to the course of the Court, to compel his appearance. The only thing which makes such a custom reasonable at all, and capable of being sustained in law, is, that the Court which has jurisdiction over the Defendant

[the Lord Mayor's Court], is in substance, by this custom, acting against the Defendant alone, to compel his submission to that jurisdiction. For this purpose, it arrests or attaches his goods within the jurisdiction, or the debts owing to him within the jurisdiction, (which are equivalent to his goods), by way of security, to enforce his appearance, in whatever hands they may happen to be found. The stakeholder, the person in whose hands these goods of the Defendant may be, or from whom the debt is due to the Defendant, has no interest in the matter and does not suffer in any interest of his own, so long as he is properly indemnified; and the custom, if duly followed, indemnifies him. The custom, in the case from which this quotation is taken, was declared by the House of Lords to be well-established; but in the following case a growing abuse of it was restrained.

*Mayor &c. of London v. Cox* (1866), L.R. 2 H.L. 239: *B.* sued *F.* in the Lord Mayor's Court for a debt of £86. *F.* having no attachable property in his own hands, the Court, by the custom of foreign attachment, made *C. & Co.* (Respondents) garnishees for an amount of £86, which they owed to *F.* Neither *B.*, *F.*, nor *C. & Co.* resided within the City, nor did the debt due from *F.* to *B.*, nor from *C. & Co.* to *F.*, arise within the City.—*Held*: that since neither the parties nor the property were within the jurisdiction, the custom of foreign attachment was not applicable; and, the Lord Mayor's Court being held to be an inferior Court, that the garnishee was entitled to a writ of prohibition to restrain the proceedings.

It should be added that, according to the later decision in *Mayor &c. of London v. London Joint Stock Bank (ubi sup.)*, *C. & Co.*, being a corporation, would not have been liable in any case to foreign attachment. The rule laid down in *Mayor &c. of London v. Cox* was followed in nearly similar circumstances in *Banque de Crédit Commercial v. de Gas* (1871), L.R. 6 C.P. 142, and in *Cooke v. Gill* (1873), L.R. 8 C.P. 107.

The following cases, though they turned on different considerations from the last, may conveniently be mentioned here, since they also deal with customs of the Lord Mayor's Court. They are all in the nature of 'usurpations'.

*Dean's Case* (1600), Cro. Eliz. 689: Dean called Alderman Garret 'fool and knave' on the Royal Exchange, and was committed by the Mayor to Newgate, because he would not find sureties for good behaviour. He brought a *habeas corpus cum causa*, denying the right of the Mayor to commit for such an offence. The Mayor claimed the right by custom. *Held*: that no such custom existed, and that the

statutes of 34 & 35 Ed. III under which it was claimed were 'principally for vagrant persons and such like, but were not intended for every private abuse'.

*Lewis v. Masters* (1697), 5 Mod. 75 : *Held* : that the creditor of an intestate could not, by the custom of London, attach money in the hands of a debtor to the intestate before letters of administration were granted. The alleged custom was declared 'repugnant and unreasonable', and to 'overthrow the principles of law'.

*Matthey v. Wiseman* (1865), 18 C.B. N.S. 657 : The custom of foreign attachment does not warrant proceedings against one who at the time of the commencement of the proceedings was dead. Hence a judgement and execution and payment by the garnishees in a suit so commenced in the Mayor's Court cannot be set up by the garnishees as an answer to a claim against them by the personal representative of the deceased, for a debt due to him in his lifetime, notwithstanding that the letters of administration were granted before execution had, and that (as was suggested) by the custom of London the personal representative might have applied in the Mayor's Court to dissolve the attachment.—*PER CURIAM* : 'We think that such a custom is unreasonable and void, if it is to be understood to mean that the non-appearance of the administratrix is to give life to a suit which was a nullity from its inception ; and, if the custom does not mean this, we do not see how the fact that the plaintiff did not intervene can affect the position of the parties.'

4. One case must now be mentioned in which, on purely legal grounds, and apart from the considerations suggested above, the Court overruled as unreasonable a custom which seems to have been established by satisfactory evidence as of actual and ancient observance.

*Rockey v. Huggins* (1631), Cro. Car. 220 : A copyholder for life set up a custom of cutting down and selling elm-trees on his tenement. The jury found the custom proved in fact. Nevertheless, it was held bad and unreasonable, though it would not have been so in the case of a copyholder of *inheritance*. 'And although it was urged at the Bar that it being found to be the custom, the Court shall not adjudge it ill and unreasonable, for it may have reasonable beginning . . . *held* that . . . it is against the nature of the estate of a copyholder that he should do acts in destruction of the estate ; because customs which maintain them shall be allowable, but not *e converso*.'

This is a rare example of a copyholder 'usurping' against his lord.

5. In conclusion, although, as I have already said, I have excluded from consideration many cases which bear only remotely on unreasonableness, I must make brief reference to two

which have been commonly cited on the point, but which do not seem to me to be relevant. *Grimesby's Case* (1456), Y.B. 34 H. 6. 25, though it is highly interesting with regard to the rights of pledgees according to the custom of London, turns not upon unreasonableness, but upon the question whether time can run against the Crown. *Clayton v. Corby* (1843), 5 Q.B. 415, was not a case of custom at all, but of prescription by an individual.

In *A.-G. v. Mathias* (1858), 4 K. & J. 579, the defendants seem to have had so little ground for their claim to grant customary gales and licences to miners in the Forest of Dean, and to exact fees without accounting to the Crown, that the crushing logic of Byles J. in dismissing their wholly unfounded pretensions seems hardly worth reproducing. In *Anon.* (1561), Moo. 8, pl. 27, where a custom that a lessee for years should hold for half a year beyond his term is said to have been declared void; and in *Lyne v. Bennet* (1576), Ben. & D. 302, concerning an alleged custom for the lord to take a heriot of the purchaser of lands within the manor, if the copyholder, the vendor, had no live beast; the reports are so meagre as to be valueless. The same remark applies to *Fryer v. Johnson* (1758), 2 Wils. 28.

## APPENDIX C

### PRECEDENT IN EQUITY

SELDEN's celebrated raillery of the 'length' of the Chancellor's conscience has sometimes been interpreted to mean that our early Chancellors arbitrarily disregarded uniformity of practice and decision. This view is emphatically repudiated by our leading historians of Equity. Spence<sup>1</sup> contends strenuously that 'there is an uninterrupted chain in the influence of precedent, from the earliest times, in the application of the principles of equity and conscience, *positively*, that is, where they ought to be applied, and *negatively*, that is, where the law ought to be left to its own operation'; and supports his thesis by strong examples. No less convinced is Kerly<sup>2</sup> that 'until the retire-

<sup>1</sup> *History of Equitable Jurisdiction*, i. 415 ff.

<sup>2</sup> *History of Equity*, 185.



ment of Lord Eldon equity was developed wholly by judicial legislation, it was entirely constructed upon precedent'. It is only necessary to look at the great cases in a collection like *White and Tudor* to realize that this statement is not too wide. No doubt until the time of Lord Nottingham the application of precedents was uncertain, owing largely to the scarcity of reliable reports;<sup>1</sup> but successive Chancellors were zealous in following the practice of the Court as closely as possible. There was an impression among common lawyers to the contrary, but that it was resented by Chancery practitioners is well shown by a discussion reported in *Fry v. Porter* (1670), 1 Mod. 300, 307. As was not uncommon at the time, the Chancellor in this case called upon the Common Law Chief Justices to assist him in his decision. In the course of the argument, Kelynge C.J. referred to several cases reported in Coke and Plowden. He was thus rebuked by Vaughan C.J., whose somewhat latitudinarian view of precedents we have already had occasion to remark (*ante*, p. 139): 'I wonder to hear of citing precedents in matter of equity, for if there be equity in a case, that equity is an universal truth, and there can be no precedent in it, so that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same *in itself*; and if the precedent be not the same case with this, it is not to be cited.' But Lord Keeper Bridgeman, answering for the Chancery, said: 'Certainly precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and besides, the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration and weighing of the matter, and it would be very strange and very ill if we should disturb and set aside what has been the course for a long series of time and ages.'

By the time of Lord Hardwicke, Equity lawyers were extremely averse from altering settled doctrine, even though it might not entirely commend itself to contemporary practice. It is true, as is pointed out in a well-known judgement of

<sup>1</sup> Some attempt at systematic reporting of Chancery decisions begins in the middle of the sixteenth century with Lambert's (so-called Carey's) Cases (1557-1604), the Choyce Cases in Chancery (1557-1606), and Tothill's Digest (1559-1646), but they are all extremely inadequate. There are no really reliable and thorough Chancery reports until Peere Williams (1695-1736). On the whole subject see Veeder, 'The English Reports', in *Select Essays in Anglo-American Legal History*, ii. 148 ff.

Jessel M.R.,<sup>1</sup> that a number of equitable doctrines are of comparatively recent origin and may be considered as the handiwork of individual Chancellors. But once established, they have been loyally followed; indeed, it may be said of the modern practice of Equity that it has depended even more than the Common Law on uniformity of decision, sometimes with the result that inelegant doctrines have perpetuated themselves to the prejudice of 'equity' in the broader sense.

This qualification may be added, that Chancery Judges of *co-ordinate jurisdiction* feel perhaps less hesitation in dissenting from each other than Judges of the King's Bench. Also, extra-judicial opinion, especially in matters of conveyancing practice, may be said on the whole to have more influence in Chancery than in the Common Law. See *ante*, p. 157, and further, Spence and Kerly, *loc. cit.* and J. M. Lightwood in Halsbury, *L. of E.* xiii. § 2.

<sup>1</sup> *In re Hallett's Estate* (1879), 13 Ch.D. 696, 710. The examples he cites are: the separate estate of married women, the restraint on alienation, the modern Rule against Perpetuities, and the rules of equitable waste.

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